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# AMERICAN CRIMINAL REPORTS.

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A SERIES DESIGNED TO CONTAIN THE LATEST  
AND MOST IMPORTANT

20

## CRIMINAL CASES

DETERMINED IN

THE FEDERAL AND STATE COURTS IN THE UNITED STATES,

AS WELL AS

SELECTED CASES,

IMPORTANT TO AMERICAN LAWYERS,

FROM THE ENGLISH, IRISH, SCOTCH AND CANADIAN  
LAW REPORTS,

WITH

NOTES AND REFERENCES.

VOL. XII.

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## PREFACE.

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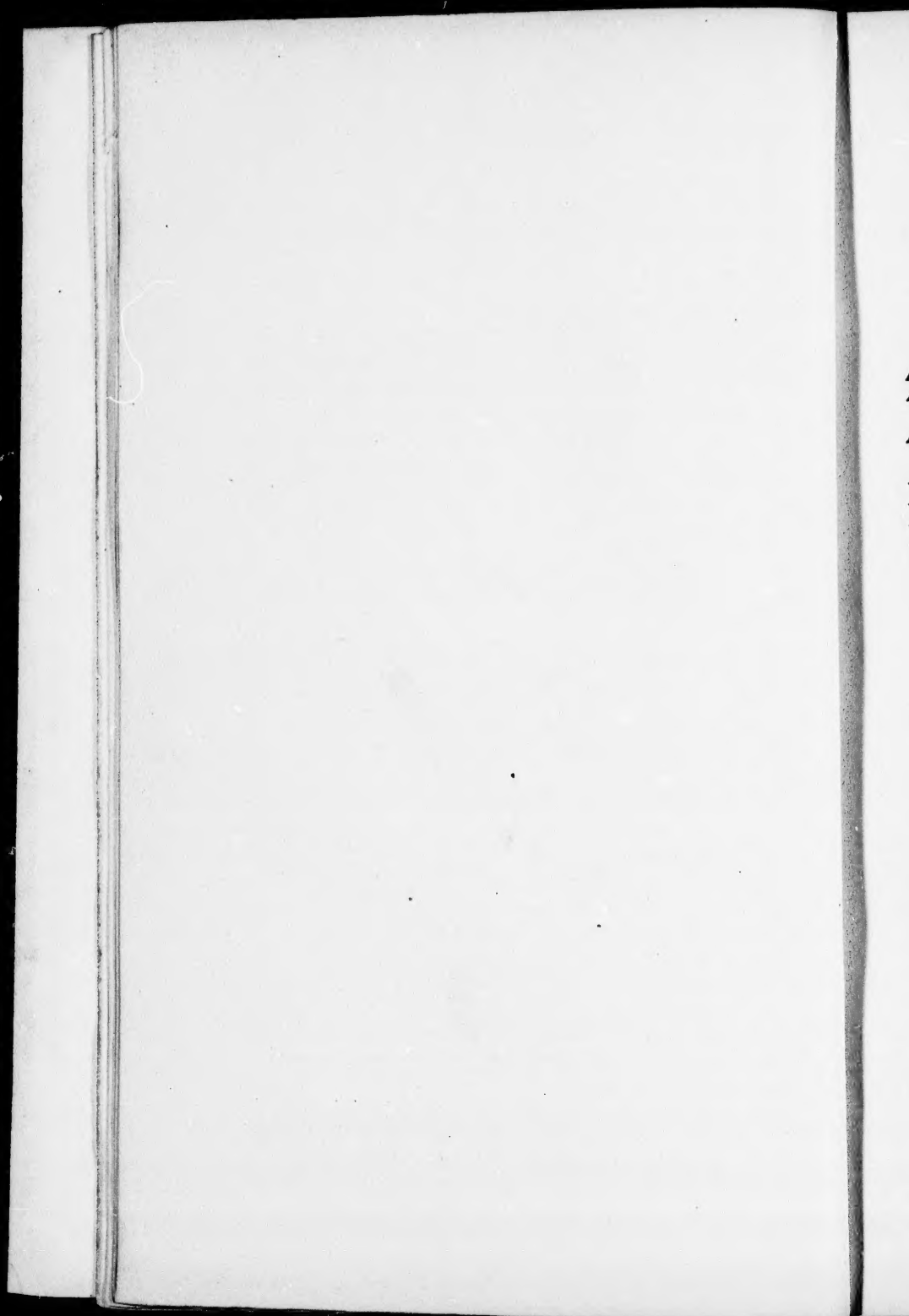
Prior volumes of these reports were designed to cover definite periods and volume 11 was brought up to September, 1899. Thinking it would be more advantageous to the Bar to have a larger number of cases on the same subject collected in one volume, a new arrangement was adopted, by which the cases from September, 1899, to January 1, 1904, are to be put into four volumes, so that all of the leading cases selected during that period on one subject, are to appear in one volume; thus Confessions, Dying Declarations and Extradition being extensively covered in this volume, will not re-appear in volumes 13, 14 and 15; unless some special reason should demand further recognition.

Each volume will have its own alphabetical arrangement of subjects.

Of the leading opinions we endeavored to select the greatest number of brief and concise ones covering a given subject; reserving those embracing a variety of topics, as material for appropriate notes. However, several rather lengthy ones, because of their special importance, have been incorporated.

It might be worthy of regretful reflection, that very often, necessity, and a spirit of conscientious endeavor, and sometimes a desultory vacuous vagueness results in the spinning of quite extensive judicial fabrics. It is not quite certain just how much of the responsibility of this is respectively attached to the voluminosity of the facts and the divergency of points, and to the *dictation* habit, which from its greater ease and rapidity, paradoxically tends to greater prolixity and diffusiveness, than the ancient quill driving process. But whatever the superinducing causes may be found to be, still the weighty and wearisome opinions will be with us.

A new feature, in the way of a Table of Topics, is introduced into this volume for the purpose of assisting the reader to trace particular subjects through prior volumes of these reports.



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**NOTE.**—The original design of this Table of Topics, was to make an index to the principal subjects, appearing in the headlines to reported cases; but considerable difficulty was experienced from the fact, that the head lines, having been written by various editors, lack uniformity. The reader should use the General Index in Volume X in connection with this Table.

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# AMERICAN CRIMINAL REPORTS.

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GAMBLE V. STATE.  
LEE V. STATE.  
McMICHAEL V. STATE.  
SEARCY V. STATE.  
WILLIAMS V. STATE.  
WILCOX V. STATE.

113 Ga. 701—39 S. E. Rep. 301.

Decided July 17, 1901.

AFFRAY:\* *Elements of the offense—Burden of proof—Evidence—Practice.*

1. This court cannot deal with the assignments of error made in an amendment to a motion for a new trial which has upon it an entry to the effect that it has been allowed by the trial judge, with nothing else to indicate an approval of its grounds.
2. Where persons are accused of an affray, and there is no evidence that the fighting occurred at a public place, a verdict of guilty is contrary to law.

(Syllabus by the Court.)

Error from the Criminal Court of Atlanta; Hon. A. E. Calhoun, Judge.

Lou Gamble, John Lee, one McMichael, Cynthia Searcy, George Williams, and Annie Wilcox being severally accused and convicted of an affray, bring error. Reversal in each case.

*F. R. Walker, A. R. Bryan and S. C. Crane*, for the plaintiff in error.

*E. R. Black*, for the State.

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\*See AFFRAY in Table of Topics.



SIMMONS, C. J. Six persons were separately accused of an affray alleged to have been committed at a certain time and place in Fulton County, Ga. The cases were tried together, and the defendant in each case found guilty. Each defendant moved for a new trial upon the grounds that the verdict was contrary to law and evidence, and without evidence to support it. Subsequently five of these motions were amended by adding special grounds. The court overruled all of the motions for new trial, and each movant excepted to the order overruling his motion. The cases were argued at the same time in this court, and will be considered together.

1. In each case in which an amendment was made to the original motion for new trial, the amendment was "allowed" by the court and ordered filed, but further than this there is nothing in the record or in the bill of exceptions to indicate an approval of the grounds of the amendment. These special grounds are therefore not sufficiently verified to authorize this court to deal with them. *Merritt v. Merritt* (Ga.) 38 S. E. 973.

2. From the evidence in the records it appears that certain officers of Fulton County, learning that there would be a dance at a certain place in the county, went to that place. As they approached the house, they heard several pistol shots, and saw the man who had done the shooting run off. They also saw five men (among them four of the defendants) engaged in a general fight. These men were placed under arrest. Then another of the defendants had a fight with a certain person in the house, and they were arrested. The remaining defendant then became engaged in a fight with still another person, and they also were placed under arrest. This fighting was attended with much noise and disorder. It took place in the front room and on the front porch of a house which had been rented for the occasion. From the briefs of evidence in some of the cases, it would appear that the house was a vacant one; from those in the others, that the house was composed of two rooms, and that the back room was occupied by a negro family. The house was in the country, was one of a row of negro houses, and was about 200 yards from any other residence. It was "near" a public road, which was in front of it; but what was the distance from the road, and whether the defendants' fighting could be seen or

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heard from the road, the evidence does not disclose. The Code section under which the defendants were accused defines an affray as "the fighting of two or more persons in some public place, to the terror of the citizens and disturbance of the public tranquillity." Pen. Code, § 355. Thus, in this State, as at common law, there cannot be a conviction for an affray unless the fighting occurs in a public place. See 4 Bl. Comm. 145; 2 Bish. New Cr. Law, §§ 1, 2; Bish. St. Crimes (3d Ed.) § 298; 2 McClain, Cr. Law, §§ 1006, 1008; *State v. Heflin*, 8 Humph. 84. Unless the defendants were fighting in a public place, their convictions were illegal. The house in which they fought appears to have been a private one, rented by the defendants. There is no suggestion in the evidence that it possessed at ordinary times any of the elements which characterize a public place. It is true, it was near a public road, and that a public road is, *prima facie* at least, a public place, and may give that character to places in sight and hearing from the road. *State v. Moriarty*, 74 Ind. 103; *Carwile v. State*, 35 Ala. 392; *Henderson v. State*, 59 Ala. 89; *Ford v. State* (Ala.) 26 South. 503. It is also true that a road which, though not a regular public highway, is used and traveled, is a public place. *Mills v. State*, 20 Ala. 86. But the evidence in the present case fails to show how "near" or how far it was from the road to the house, or that the defendants could be seen or heard from the road. So far as appears, the house may have been quite a distance from the road, and so situated that the defendants could not have been seen, or their noise heard, by persons in the road. Under such circumstances, the existence of the road cannot be held sufficient to supply the necessary element of a public place. See *Reg. v. Hunt*, 1 Cox, Cr. Cas. 177; *Gerrells v. State* (Tex. Cr. App.) 26 S. W. 394; *Graham v. State*, 105 Ala. 130, 16 South. 934. The judge below seems to have taken the position that the place was made public, for the time being, by the gathering of persons there for the purpose of dancing. This we think is not tenable. A place ordinarily private may become public, within the law of affrays, by being thrown open to the public upon a particular occasion. *Sewell v. Taylor*, 7 C. B. (N. S.) 160; *Turbeville v. State*, 37 Tex. Cr. R. 145, 38 S. W. 1010. Permitting only a certain class of the public to enter will not

prevent the place from assuming the character of a public place. *Smith v. State*, 52 Ala. 384; *Nickols v. State*, 111 Ala. 58, 20 South. 564. It has been held that an assemblage may make a place temporarily public (*Finnem v. State*, 115 Ala. 106, 22 South. 593); but it has also been held that the assemblage of a few persons at a place not open to the public will not so operate (*Taylor v. State*, 22 Ala. 15; *Coleman v. State*, 20 Ala. 51), nor the assemblage of persons at a social party by express invitation (*State v. Sowers*, 52 Ind. 311). "In general, the place must be one to which people are at the time privileged to resort without an invitation." Bish. St. Crimes (3d Ed.) § 298. In the present case it does not appear how many persons attended the dance, or were in and about the house at the time of the fighting. The evidence does not show certainly the presence of more than a dozen or fifteen people. So far as appears, the dance was entirely private, and none allowed to attend except by express invitation or previous arrangement. We believe, therefore, that the place was not shown to be so open to the general public, or to any portion of the public, as to constitute it a public place, within the meaning of the law of affrays. So believing, we are constrained to hold that the evidence failed to make out this essential element of an affray,—that the fighting was in a public place,—and that the verdicts of guilty were contrary to law. Judgment in each case reversed. All the justices concurring

NOTE (by J. F. G.)—In his work on Criminal Evidence, Roscoe says—"An affray is the fighting of two or more persons in some public place, to the terror of the King's subjects; for if the fighting be in private, it is not an affray, but an assault. 4 Bl. Com. 145. See *Timothy v. Simpson*, 1 Cr. M. & R. 757. It differs from a riot, in not being premeditated. Thus if a number of persons meet together at a fair or market, or upon any other lawful or innocent occasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only (of which none are guilty but those who actually engage in it); because the design of their meeting was innocent and lawful and the breach of the peace happened without any previous intention. Hawk. P. C. b. 1, C. 65, S. 3. Two persons may be guilty of an affray, but it requires three or more to constitute a riot. *Vide post*. Mere quarrelsome words will not make an affray. 4 Bl. Com. 146; 1 Russ. by Grea. 292."

See, also, 2 McClain on Criminal Law, sections 1006 to 1011 inclusive.

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## COYLE v. STATE.

Texas Court of Crim. App.—72 S. W. Rep. 847.

Decided March 4, 1903.

AFFRAY: \* *Self defense.*

1. The indictment contained two counts—one for aggravated assault and one for affray. There was some evidence to show that the defendant acted in self defense. The Court should have complied with the defendant's request and instructed the jury that the law of self defense was applicable to the count charging affray.
2. Upon such an indictment, the jury finding a general verdict and assessing the punishing at a fine of \$5.00, is presumed to be a verdict that he is guilty of an affray.

Appeal from Dallas County Court; Hon. Ed. S. Lauderdale, Judge.

Will Coyle being convicted of an affray, appeals. **Reversed.**

*W. T. Strange*, for the appellant.

*Howard Martin*, Assistant Attorney-General, for the State.

HENDERSON, J. Appellant was convicted of an affray, and his punishment assessed at a fine of \$5; hence this appeal.

Appellant complains of the action of the court refusing to give a charge on self-defense as against the count charging him with an affray. We have examined the record, and find that the information contains two counts—one for aggravated assault, and one for an affray. The court gave a charge on self-defense in response to the first count on aggravated assault, but failed to give a charge on self-defense as applicable to the second count on affray, although a charge was requested by appellant on this subject. The verdict is general, finding appellant guilty, and assessing his punishment at a fine of \$5. Evidently the jury found appellant guilty of an affray, and not of an aggravated assault. The State contends that the charge on self-defense is not applicable to an affray, and cites us to *Pollock v. State*, 32 Tex. Cr. R. 29, 22 S. W. 19. We have examined said case, and do not regard it as applicable to this

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\*See AFFRAY in Table of Topics.

case, or as deciding that one charged with an affray cannot rely on self-defense. The headnotes are misleading. The opinion itself finds that self-defense was not an issue in the case, and that defendant could not justify his action on the ground that he did not strike the first blow. We have examined the facts of that case, and, according to appellant's own testimony, he did not fire in self-defense. He stated that he had to fight or take back what he had said, having applied an opprobrious epithet to the prosecutor; and that he got out of his gig, in which he was riding, for the purpose of fighting the other party. In this case there was a quarrel between the parties; the testimony for the State showing that defendant occasioned the quarrel, while appellant's testimony shows that prosecutor brought it about. It is further shown that the prosecutor advanced on appellant, and when he saw him coming he picked up a stick to defend himself with, and prosecutor struck him on the head before he did anything. Under the facts of this case we think it should have been left to the jury, under appropriate instructions, to say whether or not appellant acted in self-defense in engaging in the fight. We do not understand that a person charged with an affray cannot set up self-defense, and defeat the prosecution, if he maintains his plea.

The judgment is reversed, and the cause remanded.

N. E.—See 2 McClain on Criminal Law, section 1007.

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### STATE V. FREEMAN, et al.

127 N. C. 544—37 S. E. Rep. 206.

Decided Nov. 20, 1900.

*AFFRAY:\** Burden of proof—Friendly scuffle—Practice.

1. A counter case made by the State, and filed, not considered; because the same did not conform to the statute.
2. A friendly scuffle on a public highway is not an affray.
3. It is error to instruct the jury, that the defendants by admitting there was a scuffle, assumed the burden of proving that the same was not an affray.

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\*See AFFRAY in Table of Topics.

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Appeal from Superior Court of Montgomery County; Hon. Thomas J. Shaw, Judge.

Robert Freeman and others were indicted for an affray. Defendants found guilty of assault. State accepts a verdict of not guilty as to two defendants. Judgment as to the other two, from which they appeal. Reversed.

*Douglass & Simms*, for the appellants.

*Zeb. V. Walser*, Attorney-General, for the State.

FURCHES, J. The defendants, Robert Freeman, Bud McKenzie, Henry Freeman, and Sam McLeod, were indicted for an affray. It seems from the record that all four of the defendants were put on trial, and the jury, "for their verdict, say they find the defendants guilty of simple assault. Judgment: Defendants fined fifty dollars each, and each pay one-fourth of the costs. (State accepted a verdict of not guilty as to defendants Sam McLeod and Henry Freeman.)" And it seems that the defendants Henry Freeman and A. A. McKenzie appealed. It also appears from the record sent up that defendants' counsel made up a statement of the case on appeal, service of which was accepted by the solicitor on the 18th day of April, 1900. There also appears to be a counter case made by the solicitor, which was never served, nor was service accepted by defendants or their attorneys, but on the back of which is marked, "Filed May 28th, 1900."

The counter case not having been served or acknowledged, and not having been filed until the 28th of May, more than a month after service was accepted by defendants, the counter case on appeal was too late, even if we were to hold that the word "Filed" of itself was sufficient to comply with the statute (section 550 of the Code). We will therefore have to be governed by the case made by the defendants; and, as we have to be governed by the defendants' statement of the case, we will say that, while there is some difference in the statement of facts in the two cases, there is very little difference in that part of them upon which our opinion is based. The "case" states that "all the evidence in the case tended to show that the defendants

were under the influence of liquor, and while returning from a fishing party along the public road, in company with various other parties, engaged in a friendly scuffle, when the defendant A. A. McKenzie caught his foot under a pole and fell, and the defendant W. R. McKenzie also fell over the same pole, and fell on the defendant McKenzie. One Seawell Freeman, who was standing near by, immediately caught the defendant Freeman by the arm, lifted him up, and carried him into a lot about twenty yards away, when the defendant picked up a small stick from the ground, but did not offer or attempt to use the stick. The defendants were introduced, and testified in their own behalf. They admitted that they engaged in a scuffle, but declared that they [were] not mad, and that the engagement was entirely friendly. His honor, among other things, charged the jury that, the defendants having admitted that they were in a scuffle, the burden shifted from the State, and the defendants must satisfy the jury that they were not mad and fighting, and that the encounter was a friendly one. To this part of his honor's charge, defendants excepted." This charge in this bill is an affray by fighting together in a public place. There must have been a fighting,—an affray,—before there could be a criminal offense. *State v. Crow*, 23 N. C. 375. This must be admitted by the defendants, or found from the evidence by the jury, and the burden is on the State. Every man is presumed to be innocent until he confesses his guilt, or is found guilty by a jury of his country. The defendants did not confess their guilt. Indeed, they denied it. It cannot be that parties "engaged in a friendly scuffle" are guilty of an affray, and this is all that they admitted. We see very little, if any, evidence of an affray. But, if there had been ever so much, it was still for the jury to say whether there was an affray or not. *State v. Baker*, 65 N. C. 332. That is, whether the defendants were mad and fighting or not. We know that the law is that where two or more parties are indicted for an affray, and the affray (the criminal offense) is admitted or found from the evidence, then the burden is shifted, and thrown upon any one of the parties engaged in the affray to justify or excuse himself from guilt. But this only takes place after the offense is established.

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To apply this rule before a breach of the peace has been established would be to compel the defendant to prove himself innocent of the charge preferred against him by the State. This is in violation of the constitutional rights of every freeman, and is not the law. If the judge thought there was enough evidence to carry the case to the jury, he might have properly charged them that if they found from the evidence that the defendants were made and were fighting, and not scuffling (with proper explanation as to what was a fight,—an affray), then the burden changed, and, if any or either one of them was not guilty, the burden was on him to show he was not. If it was only a friendly scuffle, it was a pretty dear one to them,—\$50 each, and one-fourth each of the costs. There was error, for which there must be a new trial. Error.

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STATE v. FRITZ.

133 N. C. 725—45 S. E. Rep. 957.

Decided Dec. 15, 1903.

**AFFRAY:\*** *Conviction of, on indictment charging dueling—Elements of the offense.*

1. "The charge of the greater offense warrants a conviction of a lessor one embraced in it."
2. The indictment charged dueling. The proof showed a fight without the use of weapons entered into by agreement. The verdict was guilty of an affray. Verdict sustained.

Appeal from the Superior Court of McDowell County.

James Fritz was indicted for dueling, and convicted of an affray. He appeals. Affirmed.

CLARK, C. J. The defendant and one Hollifield were indicted under the Code, § 1012, in that they "did unlawfully and wilfully send and accept challenge to fight a duel and did fight a duel." Fritz alone was on trial.

The jury returned the following facts, found as a special ver-

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\*See AFFRAY in Table of Topics.



dict: "That in January, 1903, the defendants had a fight on Sunday, on Buck Creek, McDowell County; that on the night before the fight, Fritz came to John Padgett's house, where Hollifield was, and said he would fight Hollifield, offered to fight him then, but said he would meet him anywhere and fight fair. No time and place were agreed upon that night. Fritz came by Padgett's on this occasion, cursing Hollifield and offering to fight; Hollifield sent Padgett to see Fritz next day, and tell him to come down and fight; Padgett went and told Fritz what Hollifield said, and Fritz said he would come; the agreement was to meet at a certain corner tree about midway between where Hollifield was at Padgett's and place where Fritz was when witness Padgett delivered the message. The agreement was to fight a fair fight with fists and hands, and not to use any deadly weapon. On the morning of this day, when Padgett delivered the message to Fritz and Fritz agreed to fight, Padgett told Hollifield or sent him word that Fritz would come and fight at the corner tree, and both did meet there that day, two persons coming with Padgett, and these, with the others, made seven persons, in whose presence, and in two minutes after meeting, they did fight with hands and fists, and without the use of deadly weapons, until one was pulled off the other. There was no serious damage, and both fought a fair fight with fists and hands. If upon this state of facts the court is of the opinion that the defendant is guilty of the offense with which he stands charged, the jury find him guilty; but if the court is of the opinion that the defendant is not guilty, the jury find him not guilty." Upon these facts the court instructed the jury to find the defendant not guilty of fighting a duel as charged, and they so found; and the court further instructed the jury to find the defendant guilty of an affray under the bill, and they so found. Judgment was rendered that defendant be discharged as to fighting the duel. The State excepted and appealed. The court adjudged that the defendant pay a fine of \$10 and the costs as to the affray. Defendant appealed.

In the appeal by the State there is no error. Webster's International Dictionary defines "duel" to be: "A combat between two persons, fought with deadly weapons by agreement." The

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Century Dictionary, Worcester's, and Stormonth's give the same definition, as does also Black's Law Dictionary. Dueling was an offense at common law. 4 Bl. Com. 145. In 2 Bishop's New Criminal Law, § 313 (2) it is doubted whether the use of deadly weapons is essential to a duel, but the fighting must at least be upon such mutual agreement as permits one combatant to take the life of the other. 10 A. & E. Enc. (2d Ed.) 311. Both at common law and under our statute, the offense is complete, although no casualty results. It is clear that here there was neither an invitation to, nor an engagement by agreement in, a deadly combat. If the parties felt that they were bound to fight, it is to their credit that they both kept their agreement "to fight a fair fight and not to use any deadly weapon," and that no serious damage was done. The statute does not visit such conduct as this with deprivation of the privilege of holding "any office of trust, honor or profit in the State," without benefit of "any party or reprieve to the contrary notwithstanding." Code, § 1012.

In the appeal by the defendant there is likewise no error. The facts found certainly constituted an affray, which is a mutual fighting of two or more by consent in a public place. The presence of seven other persons made it a public place, but if in a private place it is still an assault. *State v. Baker*, 83 N. C. 650; Bouvier's Law Dict. "Affray." An affray consists of mutual assaults, of which one person, as in this case, may be convicted, where the other may be acquitted or not put on trial. *State v. Brown*, 82 N. C. 585. Dueling is simply an aggravated form of affray (4 Bl. Com. 145), and under such indictment the parties may be convicted of a mutual fighting by consent without deadly weapon. The charge gave jurisdiction to the Superior Court, which it retains though the proof is of an offense of which a justice of the peace has jurisdiction; but on conviction of the simple assault the punishment must not be beyond that which a justice of the peace could impose. *State v. Ray*, 89 N. C. 587; *State v. Fesperman*, 108 N. C. 770, 13 S. E. 14. The charge of the greater offense warrants a conviction of a lesser one embraced in it, just as on an indictment for murder there can be a conviction of murder in the second de-

gree or manslaughter, a principle which chapter 68, p. 118, Laws 1885, extends to authorize a conviction of assault, if the evidence warrants it, though the prisoner is acquitted of the felony, upon an indictment for any felony which includes an assault as an ingredient.

No error.

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STATE V. GRIFFIN et al.

125 N. C. 692—34 S. E. Rep. 513.

Decided Dec. 12, 1899.

AFFRAY:\* *Assault and battery—Instructions.*

1. "When the affray charged is the fighting of two or more persons on a public highway or street, or simply in a public place, the indictment is, in effect, merely for the several assaults and batteries, one bill being used simply to avoid several trials for the same offense."
2. It was not error for the Court to instruct the jury upon "the law as to mutual assaults and batteries, without charging the specific law as to affrays."

Appeal from the Superior Court of Union County; Hon. A. L. Coble, Judge.

William Griffin and others being convicted, they appeal. Affirmed.

*Armfield & Williams*, for the appellant.

*Brown Shepherd* and the *Attorney-General*, for the State.

CLARK, J. The indictment is lost, but an agreement is sent up in the record that it was in the usual form for an "affray." Four defendants were on trial. The evidence was that the melee occurred in the road, but it was not stated whether or not it was a public road. The defendants asked the court to charge the jury that they must acquit the defendants unless they were satisfied beyond a reasonable doubt that the fighting was in a public place, and excepted to the refusal so to charge. An

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\*See AFFRAY in Table of Topics.

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affray may be committed by "going armed with unusual and dangerous weapons, to the terror of the people." *State v. Huntly*, 25 N. C. 418. But when the affray charged is the fighting of two or more persons on a public highway or street, or simply in a public place, the indictment is, in effect, merely for the several assaults and batteries, one bill being used simply to avoid several trials for the same offense. This is recognized in *State v. Baker*, 83 N. C. 649, in which it is said the public place need not be specified, and, of course, therefore it need not be proved. In the same case it is said that, on an indictment for an affray, one may be convicted, and the other acquitted; for, the indictment being for mutual assaults, the defendant is "convicted of the offense with which he is legally charged,"—citing *State v. Brown*, 82 N. C. 585, which holds that an indictment on a conviction for an affray may be legally described as for an assault and battery, citing *State v. Allen*, 11 N. C. 356, and *State v. Wilson*, 61 N. C. 237.

This disposes, also, of the exception that the court charged the law as to mutual assaults and batteries, without charging the specific law as to affrays. This was for the very sufficient reason that, when the affray is charged to have been by fighting of two or more, there is no distinction between the law of affray and that of assault and battery, by which it is committed. *State v. Perry*, 50 N. C. 9. The other prayer for instruction was given in substance, and need not be considered. Affirmed.

NOTE.—See 2 McClain on Criminal Law, section 1011.

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STATE v. McCLELLAN et al.

23 Mont. 532—75 Am. St. Rep. 558—59 Pac. Rep. 924.

Decided Feb. 5, 1900.

ALIBI: \* *Burden of proof—Reasonable doubt—Instructions—Witness—Cross-examination and re-direct examination.*

1. The burden of proof is not shifted by the defense of an *alibi*, and defendant cannot be convicted if the evidence raises a reasonable doubt of his presence at the time and place where the crime was committed.

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\*See ALIBI in Table of Topics.

2. Defendant cannot predicate error on the giving of an instruction which he requested.
3. An erroneous instruction charging that the defense of an *alibi*, to be entitled to consideration, must be proved by the defendant, is not cured by a subsequent charge telling the jury to acquit if they had a reasonable doubt of defendant's presence at the time and place of the commission of the alleged crime, as said charges are irreconcilable and misleading.
4. Where the prosecuting witness testified on cross-examination that he had been in jail, he may, on re-direct examination, explain the circumstances of his imprisonment.
5. Where a witness for the State testified that the prosecuting witness had paid out money for drinks in a saloon before the alleged robbery was committed, it was competent on cross-examination to show that the prosecuting witness had spent all his money before the robbery.
6. There is no error in refusing an instruction in a criminal case which singles out one witness, and directs the jury to consider his condition in particular at the time of the transactions concerning which he testified.
7. It is not error for the court to refuse a request to charge as to the duty of the jury in their consideration of the testimony of the defendant, where such subject is sufficiently covered by the instructions of the court.

Appeal from District Court of Ravalli County; Hon. Frank H. Woody, Judge.

Arthur McClellan and Michael Horrigan were convicted of robbery, and they appeal. Reversed.

*R. Lee McCulloch and Crutchfield & Draffen*, for appellants.  
*C. B. Nolan*, Attorney-General, for the State.

HUNT, J. Defendants appeal from a judgment of conviction of robbery and from an order overruling their motion for a new trial.

1. On the trial, defendants introduced evidence tending to support an *alibi*. The court gave the following instruction at the request of the State (No. 13): "The court instructs the jury that the defense of *alibi*, to be entitled to consideration, must be such as to show that at the very time of the commission of the crime charged the accused was at another place, so far away, or under such circumstances, that he could not, with any ordinary exertion, have reached the place where the crime was committed, so as to have participated in the commission

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thereof. The burden is upon the defendant to prove this defense," and then instructed as follows, at the defendants' request (No. 14): "The court instructs the jury that one of the defenses interposed by defendants in this case is what is known in law as an *alibi*; that is, that the defendants were at another place at the time of the alleged commission of the crime. If proved,—and all of the evidence bearing upon that point should be carefully considered by the jury,—or if, in view of all the other evidence, the jury have any reasonable doubt as to whether these defendants were in some other place when the crime is alleged to have been committed, they should give the defendants the benefit of the doubt, and find them not guilty." "The court instructs the jury that, as regards the defense of an *alibi*, the defendants are not required to prove it beyond a reasonable doubt to entitle them to an acquittal. It is sufficient if the evidence upon that point raises a reasonable doubt of their presence at the time and place of the commission of the alleged crime." Defendants insist that the first of these instructions quoted was erroneous in itself, and not cured by the two, or either of them, thereafter given. This contention is sound. Evidence of an *alibi* is competent under defendants' plea of not guilty. No special averment need be made to warrant the introduction of testimony in support of it. The state must prove the presence of the defendant as part of the essence of the crime as charged, except, of course, where such presence is unnecessary; but that phase of the law we need only mention. There is no *prima facie* case without showing the presence of the defendant; therefore defendant may rebut the evidence of the fact of his presence by evidence of the fact that he was not present. *Alibi* is not a special defense changing the presumption of innocence, or relieving the State of its burden of proving the guilt of the defendant beyond a reasonable doubt. Bish. Cr. Proc. § 1066. The defendant is not bound to establish it by a preponderance of the evidence. *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026. It is true that, when the State has made out a *prima facie* case of guilt, the burden is then upon the defendant to rebut such a showing; but, if he relies upon an *alibi*, he is not obliged to prove it as an effect by a preponderance of evidence, for he need only rebut

the evidence of his presence by such an amount of evidence as will, upon a consideration of the whole case, raise a reasonable doubt of his guilt of the crime for which he is on trial. *Schultz v. Territory* (Ariz.) 52 Pac. 352, (11 Am. Crim. Rep. 44). It is a necessary sequence of the statement that, when the defendant must be proven guilty by the State beyond a reasonable doubt, if there is a reasonable doubt whether he was present or absent when and where the crime was committed, a reasonable doubt of his guilt has arisen, and acquittal must follow. The somewhat confused question of how the defense of an *alibi* relates to the whole case in criminal law simplifies itself when we discard the illogical doctrine that it is an affirmative defense, to be proved by the defendant, and substitute therefor the doctrine, which easily flows from the premises already stated, that it is but one of the many defenses offered in rebuttal of the State's evidence, carrying with it to the defendant no burden of proof other than the obligation to introduce evidence sufficient to raise a reasonable doubt. This he may do by evidence sufficient to raise a reasonable doubt of his presence at the place where the act was done, and this doubt may arise without its springing from an affirmatively proved fact that he was somewhere else at the time, and could not have committed it. Section 3101, Code Civ. Proc.; *Commonwealth v. Choate*, 105 Mass. 451; *Johnson v. State*, 21 Tex. App. 368, 17 S. W. 252, 11 Am. Crim. Rep. note, 79; *State v. Taylor*, 118 Mo. 153, 24 S. W. 449, 11 Am. Crim. Rep. 51; *Peyton v. State*, 54 Neb. 188, 74 N. W. 597, 11 Am. Crim. Rep. 47. Subjected to the test of these principles, instruction No. 13 was erroneous. Its effect was to prevent the jury from giving consideration to the defendants' evidence tending to establish an *alibi* unless they had carried their burden, and proved the defense, whereas the court ought to have charged that it was the duty of the jury to consider all the evidence before them, including that bearing upon the *alibi*, and conclude from the whole thereof whether the guilt of the defendants was proven beyond a reasonable doubt. It follows that the burden of proof was not altered by the defense of an *alibi*. If the defendants' evidence upon that point raised a reasonable doubt of their guilt, it became the duty of the jury to acquit, even though they were not satisfied that the

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*alibi* was clearly established as a fact. *State v. Taylor, supra; Walters v. State*, 39 Ohio St. 215, 4 Am. Crim. Rep. 33; *People v. Roberts*, 122 Cal. 377, 55 Pac. 137, 11 Am. Crim. Rep. 31. What we have just said pertains in many respects to instruction No. 14, given at defendants' request, although, were it not for the greater and further extending error throughout instruction 13, given at the instance of the prosecution, we should not reverse the case for the erroneous principle announced in No. 14, inasmuch as defendants cannot predicate error upon the giving of an instruction requested by themselves. *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558. Instruction No. 15 was not consistent with No. 13. The one (No. 13) required the defendants to prove an *alibi*, and authorized an acquittal on that ground only if the defendants proved the *alibi*. Evidence only tending to prove it, did not permit the consideration of the *alibi* as a defense. It was useless to defendants unless they had established the fact. Thus a reasonable doubt of the presence of the defendants at the commission of the offense charged could not avail them, for they were obliged to prove their absence as a fact in negation of the State's necessary proof of the fact of presence. No. 15, on the other hand, told the jury to acquit if they had a reasonable doubt of defendants' presence at the time and place of the commission of the alleged crime. To clearly reconcile these confusing statements is impossible. The Supreme Court of Iowa, in *State v. Maher*, 74 Iowa, 77, 37 N. W. 2, has said that substantially similar charges are not necessarily inconsistent or contradictory, resting their opinion upon the difference between a defense and the evidence tending to establish a defense. But the learned court assume, as a matter of course, that, if the *alibi* is not established by a preponderance of evidence, it is not to be considered as proved, and that, unless so proved, it can have no consideration in controlling their finding on the defense of an *alibi*. With this assumption we cannot agree. In our opinion, too, the argument that a jury would be able to draw the distinction recognized by the Iowa court, at least without special explanation of its possible existence, is strained. The emphasized error in No. 13 cannot well be harmonized with the



proposition in No. 15 without overlooking the full applicability of the doctrine of reasonable doubt to the whole case, and for that reason the instructions are misleading. The discordance between the rule that a reasonable doubt justifies an acquittal, yet that, where defendants rely upon an *alibi*, they must prove it by a preponderance of evidence, is especially well pointed out by the very strong reasoning of Chief Justice Adams in his dissenting opinion in *State v. Hamilton*, 57 Iowa, 596, 11 N. W. 5, and by Judge Fuller, dissenting, in *State v. Thornton* (S. D.) 73 N. W. 196, 41 L. R. A. 530. In conclusion, our opinion is that instruction No. 13 was radically wrong, and that the prejudice done by it to the defendants' rights was not cured by instruction No. 15, for the two are inharmonious and misleading. We will briefly notice a few points that are apt to arise on another trial of the case:

2. The prosecuting witness testified on his cross-examination that he had been in jail in the springtime of the season of the trial. On re-direct examination the county attorney asked him to state why he had been in jail. The defendant objected, and the court overruled the objection. The court was clearly correct. Doubtless the purpose of eliciting the fact from the witness that he had been in jail was to effect the credibility of his testimony, so it became admissible for him to explain the circumstances of his imprisonment.

3. A witness for the State testified that the prosecuting witness had been drinking with the defendants in a saloon about the time of the alleged robbery. On cross-examination he testified to the fact that the prosecuting witness was "treating" other persons, and "paying for the drinks." The defendants then interrogated the witness with a view of eliciting how much money the prosecuting witness expended in the saloon on the evening of the alleged robbery. The court stopped the examination for the reason that it was not proper cross-examination. We think the court erred in this ruling. The witness having testified to the fact that the prosecuting witness had paid out money for drinks before the alleged crime was committed, it was competent on cross-examination to test the witness' means of knowledge concerning the money paid out, and to show, if it could be shown, that the prosecuting witness had ex-

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4. The defendants asked for an instruction telling the jury that it was their duty to take into consideration "the condition the witness was in at the time of the transactions concerning which he testifies, as a test of the accurateness of his statements." It was not error to refuse an instruction which singled out one witness, and directed the jury to consider his condition in particular.

5. The court refused to charge that the jury had no right to disregard the testimony of the defendants merely because they were the defendants, and stood charged with the commission of a crime; and, furthermore, that the defendants' testimony should be fairly and impartially considered, together with all the other evidence in the case. There was no error in the refusal of the court to give this instruction, for the court charged that the defendant in a criminal action may testify in his own behalf, and that the jury, in judging of his credibility and the weight to be given his testimony, should take into consideration the fact that he is the defendant, and the nature and enormity of the crime of which he is accused. There was also a general charge that a witness is presumed to speak the truth, but that this presumption might be expelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integrity, or his motives, or by contradictory evidence, and that the jury were the exclusive judges of his credibility. We hold that this was sufficient, and that there was no error in refusing the instruction requested.

6. Appellants make the point that the evidence is insufficient to sustain the verdict. There was ample evidence to warrant the submission of the case to the jury. The judgment and order appealed from are reversed, and the cause remanded, with directions to proceed as herein indicated. Reversed and remanded.

BRANTLY, C. J., and PIGOTT, J., concur.

NOTE (by J. F. G.).—There is an apparent inconsistency in this opinion. If the State must prove guilt beyond all reasonable doubt, and

if the burden of proof never shifts, the burden is not on the defendant to create a reasonable doubt.

In a criminal case a reasonable doubt may exist because of insufficiency of evidence given on behalf of the prosecution; or by reason of evidence given on behalf of the defendant; or because, considering all of the evidence, the mind is not convinced beyond a reasonable doubt.

It is true that when the prosecution has closed its case, and the defendant moves for a verdict of acquittal, the court may overrule the motion, because in the opinion of the court, *if the witnesses are believed*, there is a *prima facie* case to go to the jury; but when the case goes to the jury all the evidence goes together as a unit, and the question then is: After considering all of the evidence, is the defendant proven guilty beyond all reasonable doubt?

On an indictment for assault and battery, where the evidence on the part of the prosecution, considered by itself, would sustain a verdict of guilty; and the defendant admits the encounter, but says that he acted in self-defense, no burden rests on the defendant to create a reasonable doubt; yet where the defendant does not admit any material allegation of the charge, but simply denies his presence at the supposed offense, it is claimed that he should create a reasonable doubt.

If the burden is on the defendant to prove any part of his defense, it is the burden to prove a *fact*; and not to simply cause confusion and doubt in the evidence, so that there is no proof. Consequently, those courts that hold that the burden is on the defendant to make out his defense by a preponderance of evidence, are, in a sense, more logical than those who hold that the evidence of the defense should raise a reasonable doubt. The error lies in this: It is falsely assumed that the defendant undertakes to prove that he was at a specific place, other than that of the alleged crime; and that consequently that contention becomes a material issue in the case; whereas, in fact, the only issue is: Was the defendant at the place of, and did he commit, the alleged crime? His defense is purely a negative one. In denying his presence he incidentally shows where he was at such time, merely as a corroborative circumstance to sustain his direct denial. (This subject is more fully reviewed in notes to 11 Am. Crim. Rep., page 77. See, also, *Johnson v. State*, 21 Tex. App. 368, 17 S. W. Rep. 252, 11 Am. Crim. Rep. 79.)

The theory that while the burden of proof in a criminal case never shifts; but that the law requires the defendant, in cases of this kind, to create a reasonable doubt, arises from a desire to compromise with decisions based upon false premises; and in a degree to follow those decisions, which should either be ignored or overruled.

The difficulty in the present case (*State v. McClellan*) seems to be a reluctance to expressly overrule an erroneous doctrine announced in *State v. Spotted Hawk*. In the present case the court seems to have been well advised as to the law; while in *State v. Spotted Hawk* the only authority cited is Thompson on Trials. Mr. Thompson in his work (section 2437) seems to adhere to the doctrine of *proving an alibi*; and says: "This view, that the doctrine is, that the burden of proof to establish an *alibi* is on the defendant, and that this defense must be established by a preponderance of evidence, has gained considerable

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foothold, and is possibly the prevailing view." He cites the Iowa cases as his authority, admitting that a minority of that court (two out of five judges) "endeavored to break away" and announce the Indiana rule. These Iowa cases are reviewed on pages 86-88, 11 Am. Crim. Rep.

In *State v. Spotted Hawk* the court said: "While the burden of establishing an *alibi* beyond a reasonable doubt, or even by a preponderance of the evidence, does not rest upon the defendant (2 Thompson on Trials, section 2435), the burden certainly does rest upon him to furnish the proof tending to establish it. (*Id.*) Therefore, taking the instruction given by the court as a whole, it is correct, and covers the whole ground. It expressly leaves the question of reasonable doubt for the jury to determine, upon all the evidence, and the use of the word 'proven' does not cast any other burden upon the defendant than that he should furnish some proof tending to establish the defense upon which he relies."

Had the same authorities been reviewed in *State v. Spotted Hawk* as are cited in the present case, probably a different doctrine would have been announced.

In sustaining our position we refer to cases in 11 Am. Crim. Rep. on pages 31, 33, 36, 44, 47 and 51; notes in that volume on pages 77 to 88 inclusive; and *Walters v. State*, 39 Ohio State, 215, 4 Am. Crim. Rep. 33.

*An illustrative case.*—Our contention is well illustrated by a case tried in the criminal court of Cook county March, 1903, in which the writer was counsel for the defendants. In that case the prosecuting witness had evidently been instructed to avoid giving dates; and was studiously following that line; but finally stated with great positiveness, that a certain material matter antecedent to the alleged crime, transpired with the witness and one of the defendants in the week commencing September 21, 1902. The defense proved by documentary evidence that on Thursday that week, that defendant was due in the city of Washington; and proved by his stenographer that he was absent from Chicago for about ten days, including that particular week; a Chicago lawyer testified that he met him that week before a patent commissioner at Washington; while the defendant gave a full account of his absence and route of travel, stating that he was at Washington, Pittsburgh and other eastern cities. Thus, we were not attempting to locate him at a particular hour or day; and were not attempting to prove an *alibi*; but were simply negativing the statement that he was connected in a certain supposed matter that week in Chicago, in that he was absent from Chicago during the entire time; accordingly on that part of the case the issue was: Did he participate in a certain matter in Chicago, at any time, during that particular week? The entire evidence not sustaining the affirmative of this issue beyond all reasonable doubt the case failed and both defendants were acquitted.

*Criticisms on the use of the word "alibi"*—A semi-approved instruction.—In *State v. Jones*, 153 Mo. 457, 55 S. W. Rep. 80, decided January 23, 1900, the court said:

"It is strongly insisted, also, that the court erred in refusing de-



lute possibility of presence at the time and place of the offense, to be of some value. It can be admitted and considered for what it may be worth. If it renders it very improbable that defendant could have been present, it should be considered, in connection with the other evidence in the case, in determining whether or not there is a reasonable doubt of defendant's guilt.

"It is insisted that this instruction was vague and misleading, and that parts of it were the equivalent of telling the jury that they must be conclusively convinced that the defendant was not present at the commission of the crime alleged, and that it was incumbent on the defendant to show conclusively that it was impossible for him to have been present at the time and place, before this defense would be of any avail. While we do not think the instruction is amenable to the severe criticism to which it has been subjected, or that any part of it, when taken in its proper connection, will bear the construction thus put upon it, yet we do not think, in view of the fact that the defense rested largely upon the claim of an *alibi*, and there was much testimony tending to support this claim, the law on this subject was as distinctly put to the jury as the defendant had a right to demand. The rule on this subject as laid down in *Davis v. State*, 5 Baxt. 617, *Wiley v. State*, Id. 662, and *Jefferson v. State*, 3 Tenn. Cas. 330, and approved in many other cases, is that, 'where the proof fairly raises the defense of an *alibi* the jury should be instructed that if this proof, in connection with the other proof in the case, raises a reasonable doubt as to whether the accused was at the place of the homicide, or at a different place, the defendant should be acquitted.' As has been said: 'This is a sound rule, and ought to be given to the jury in direct and unequivocal language.'"

In *Tijerina v. State* (Tex.), 74 S. W. Rep. 913, decided May 27, 1903, the court said:

"The court should have given the charge on *alibi*. This issue was raised by the testimony of two witnesses, and it did not matter that the State introduced a witness who testified appellant was in Atascosa County at or about the time said horses were alleged to have been stolen. The issue of *alibi* was a question for the jury to decide, and, inasmuch as the evidence raised the issue, the charge on that subject should have been given. *Arismendis v. State* (Tex. Cr. App.), 60 S. W. Rep. 47; *Rountree v. State* (Tex. Cr. App.), 55 S. W. Rep. 827.

"For the errors discussed, the judgment is reversed, and the cause remanded."

In *State v. Koplan*, 167 Mo. 293, 66 S. W. Rep. 967, decided February 25, 1902, the court said:

"The defense was an *alibi*; that is, that the defendant was elsewhere than at the place of the commission of the crime at the time it was committed. The court gave no instruction upon this theory of the case, although defendant testified that he was not present at the commission of the offense, and called the court's attention to the fact that the instructions given 'do not cover the whole law of the case,' and in this, we are of the opinion, committed reversible error."

*Suggestions as to instructions in behalf of the defense.*—In preparing instructions for the defense it is probably the safer method to discard the word "*alibi*"; but express in clear language those fundamental principles of law by which the defendant is presumed innocent throughout the entire hearing of the evidence, and which places upon the prosecution the burden of proving beyond all reasonable doubt that the defendant committed the alleged crime. By this method, the writer has succeeded in several instances, in having instructions given in the Criminal Court of Cook County, which stated the law in direct conflict with several of the *alibi* decisions of the Supreme Court of Illinois. The instructions were consistent with the general fundamental doctrines. To have rejected them would have been reversible error. A few forms are here suggested:

*Forms suggested for instructions.*—The court instructs the jury that the burden is on the prosecution to prove beyond all reasonable doubt:

*First.* That the crime charged in the indictment has actually been committed.

*Second.* That the defendant was present at the time and place of the alleged crime and committed it.

The fact that the defendant says he was not present at the time and place of the alleged crime must not, in the least degree, be considered as an admission by him that such alleged crime has been committed by some one; nor does it cast on the defendant, in the least degree, the burden of proving that he was not present at the time and place of the alleged crime; but the burden is on the prosecution to prove guilt beyond all reasonable doubt. If, after the jury has considered all of the evidence given on each side of the case, the jury is not fully convinced by the evidence, beyond all reasonable doubt, that the defendant is guilty, then the verdict must be not guilty.

The issue to be determined in this case is: Has the alleged crime been committed in the manner and form as charged in the indictment, and was the defendant then and there present, and did he commit it? Under this issue it devolves on the prosecution to prove, beyond all reasonable doubt, that the defendant was present and committed the alleged crime, and it does not devolve on the defendant, in the least degree, to prove that he was elsewhere. If from the evidence the jury have a reasonable doubt as to whether the defendant was present and committed the crime, the verdict must be not guilty.

A reasonable doubt may exist, because of a lack of evidence on the part of the prosecution; or because of evidence given on part of the defense; or because all of the evidence, on both sides of the case, when carefully considered, does not prove beyond all reasonable doubt that the defendant is guilty as charged.

The court instructs the jury as a matter of law that the defendant is presumed to be innocent until proven to be guilty beyond all reasonable doubt. This presumption of innocence continues until all the evidence on each side of the case is in; and then the question for the jury to determine is: Considering all the evidence, on both sides of the

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case, has the defendant been proven to be guilty as charged, beyond all reasonable doubt.

The court instructs the jury that the real issue in this case is not whether the defendant was at the city of Pittsburgh, Pennsylvania (or any other place where the defendant claims he was) at the time of the alleged crime; but the real issue is whether he was at the time and place of the alleged crime, and committed it. The statements made by witnesses on behalf of the defendant, that the defendant, at the time of the alleged crime, was in Pittsburgh, Pennsylvania (or such other place as applies to the evidence in that particular case) must not be considered as an effort to prove that he was at Pittsburgh, Pennsylvania; but simply as negative evidence, denying that he was present at the time and place of the alleged crime, and as a corroborative circumstance of such denial. If after considering all the evidence, the jury have a reasonable doubt as to whether or not the defendant was present at the time and place of such alleged crime, and committed it, the verdict should be not guilty.

*Approved instruction.—Gallagher v. State*, 28 Tex. Crim. Rep. 24: "Amongst other defenses interposed in this case by the defendant is what is known in legal phraseology as an *alibi*—that is, that if deceased was killed as alleged, the defendant was at the time of such killing at another and different place from that at which such killing was done, and therefore was not, and could not, have been the person who killed deceased, if she was killed. Now, if the evidence raises in your mind a reasonable doubt as to the presence of the defendant at the place where the deceased was killed (if killed) at the time of such killing, then you should acquit the defendant."

*Approved instruction.—Stevens v. State* (Tex.), 59 S. W. Rep. 545, decided June 27, 1900: "The defendant could not be guilty as charged unless he was present at the commission of the offense, if any; and if you have a reasonable doubt of the defendant being present at the killing of said Jim Humphries, if any, then you will acquit him." This instruction was given by the judge at the trial. It was approved by the court of criminal appeals, in the following language: "This is a distinct, clear, and substantive charge upon the law of *alibi*, disconnected from and independent of any other part of the charge, and, we think, clearly presents the law of *alibi* to the jury. We therefore do not agree with appellant that his defense was not charged by the court."

*Approved instruction.—In Long v. State*, 42 Fla. 509, 28 So. Rep. 775, decided July 28, 1900, error was assigned upon the refusal to give the following instruction: "It is not necessary that the defendants shall prove an *alibi* beyond a reasonable doubt. It is sufficient if the evidence offered to prove an *alibi* raises a reasonable doubt in your minds whether or not the accused were at the scene of the crime, and participated therein. In such case it is your duty to acquit the accused." In reversing the judgment the court said: "This instruction correctly states the law, as held by this court in *Adams v. State*, 28 Fla. 511, 10 So. Rep. 106, and we think the failure to give it constitutes reversible error. The defense interposed by the defendants was an



*alibi*, and they introduced evidence tending to prove it. It was the right of the defendants to have the jury instructed that they were not required to prove their defense beyond a reasonable doubt, but that if the evidence on that subject was sufficient to raise in the mind of the jury a reasonable doubt that they were present when the alleged crime was committed, and participated therein, that was all the law required to entitle them to an acquittal. There is no reference to the defense of *alibi* in the charge or instructions given by the court, and as the instruction requested was regularly presented and refused, and an exception taken, we must reverse the judgment because of the refusal of the court to give it."

Although for failure to give this instruction the judgment was reversed, it would have been in better form with the words "*beyond a reasonable doubt*" omitted from the first sentence. In fact the instruction was based on the fallacious theory of *proving an alibi*; and ignored the fact that the doubt might arise from insufficient evidence on the part of the prosecution. If on *all* the evidence the jury entertain a reasonable doubt as to guilt an acquittal must follow.

*Approved instruction.*—*Ackerson v. People*, 124 Ill. 563 (569), re-affirmed in *Sheehan v. People*, 131 Ill. 22 (24): "The court instructs the jury, as a matter of law, that where the people make out a case as would sustain a verdict of guilty, and the defendant offers evidence, the burden is on him to make out that defense, and as to an *alibi* and all other like defenses that tend merely to cast a reasonable doubt on the case made by the people when the proof is in, then the primary question is—the whole evidence being considered, both that given for the defendant and for the people—is the defendant guilty, beyond a reasonable doubt. The law being that when the jury have considered all the evidence, as well that touching the question of the *alibi* as the criminating evidence introduced by the prosecution, then if they have any reasonable doubt of the guilt of the accused of the offense with which he stands charged, then they should acquit, otherwise not."

This instruction is contrary to the doctrine laid down in *Hopp v. People*, 31 Ill. 385, and is self-contradictory; for if the burden is on the defendant to make out his defense, the doctrine of reasonable doubt does not apply. See a review of Illinois cases on this subject in 11 Am. Crim. Rep., pages 83, 84 and 85.

*Other approved instructions*, see *People v. Fong Ah Sing*, 11 Am. Crim. Rep. 33; *State v. Taylor*, 11 Am. Crim. Rep. 51.

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## STATE v. MANNING.

74 Vt. 449—52 Atl. Rep. 1033.

Decided Aug. 21, 1902.

*ALIBI: \* Effect of false testimony—Misleading instruction.*

1. The introducing of false testimony in support of an *alibi* is a circumstance which the jury may consider; but is not positive proof of guilt.
2. An instruction which states a proposition of law in such a manner as to mislead the jury is reversible error.

Exceptions from County Court, Windsor County; Hon. Wendell P. Stafford, Judge.

Peter Manning convicted of rape, brings error. Reversed.

Argued before *Rowell, C. J.*, and *Tyler, Munson, Stout, Watson, Stafford* and *Hazelton, JJ.*

*Charles P. Tarbell*, State's attorney.

*Gilbert A. Davis*, for the defendant.

ROWELL, C. J. The prisoner set up an *alibi*. The court charged that if he fabricated it, the jury had a right to consider that as positive proof of guilt. Although there may be no erroneous statement of legal principle in this, it was such a failure adequately to present the law's view of a fabricated *alibi* as criminative evidence as to call for a reversal, for it was calculated to mislead the jury into supposing that in the event named it was bound to convict. The law says that a fabricated *alibi* is a criminative circumstance, and an inferential admission of guilt, but not conclusive. *State v. Ward*, 61 Vt. 153, 194, 17 Atl. 483. Mr. Bishop says that a failure in the proof of an *alibi*, while in special circumstances, such as where it discloses an attempt to mislead by false evidence, it may justly prejudice the prisoner's case, is not otherwise more significant than the like failure in any other part of his proof. 1 Bish. New Cr. Proc. § 1063.

Judgment and sentence reversed, verdict set aside, and cause remanded for a new trial.

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\*See ALIBI in Table of Topics.

NOTE (by J. F. G.).—In *Crittenden v. State*, 131 Ala. 145, 32 So. Rep. 273, decided June 12, 1902, without assigning any reason, the following instruction was held not to be reversible error:

"If the jury believe from the evidence, beyond a reasonable doubt, that the *alibi* set out in this case is simulated, false and fraudulent, they may consider this as a circumstance against the defendant, and in connection with the other evidence in the case."

In *Prince v. State*, 100 Ala. 144, 14 So. Rep. 409, 46 Am. St. Rep. 28, the following instruction was held to be reversible error:

"That if the defendant has failed to establish his *alibi* through the perjury, or through the want of recollection of his witnesses, it is a circumstance against him."

In *Albritton v. State*, 94 Ala. 76, 10 So. Rep. 426, the following instruction was held to be reversible error:

"An unsuccessful attempt to prove an *alibi* is always a circumstance of great weight against the prisoner." In reversing the case the court says: "An *alibi* is not, in the strict and accurate sense, a special defense, but a traverse of a material averment in the indictment, that the defendant did, or participated in the particular act charged, and is comprehended in the general plea, *not guilty*. Because susceptible of easy fabrication, and often attempted to be sustained by perjury, whereby the accused endeavors to break the network of facts and circumstances surely bringing him to conviction and punishment, the proof of an *alibi* is, and should be, subjected to careful scrutiny; but it is an error to assume that the law looks on such attempt with suspicion."

In *Parker v. State*, 136 Ind. 284, 35 N. E. Rep. 1105, the following instruction was held to be reversible error:

"Evidence has been introduced on behalf of the defendants tending to prove an *alibi*, and if you should find, upon considering this evidence, that it is sufficient to raise a reasonable doubt in your minds as to whether the accused, or either of them, were at the place where the alleged crime was committed, then the accused, or the one as to whom such doubt arises, if it arises as to any, is entitled to acquittal; and the failure of either of the defendants to account for his whereabouts during all the time within which the offense might have been committed, is not of itself a circumstance tending to prove his guilt, but a failure of this character may be properly considered by you in connection with any other evidence in the case, tending to prove guilt, if you find that there is such."

In its opinion the court said: "In criminal cases, the entire burden is upon the State from the beginning, and the accused is not bound to explain anything, and his failure to do so cannot be considered as a circumstance tending to prove his guilt. *Doan v. State*, 26 Ind. 495; *Clem v. State*, 42 Ind. 420."

In *Adams v. State*, 28 Fla. 511, 10 So. Rep. 106, the following instruction was held to be reversible error:

"When proof of an *alibi* is attempted and proven to the satisfaction of the jury, it is conclusive of the case. When it is attempted, and the

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proof to sustain it is not satisfactory, the failure to prove it satisfactorily is a circumstance unfavorable to the defendant, but it is no more so than an attempt to clear himself by any other false or fabricated testimony."

In its opinion the court said: "The defense of an *alibi* may be proved, and the evidence fail to establish it, or the defendant may put in all the evidence he has to prove the *alibi* and it may not be satisfactory to the jury, yet the unsuccessful attempt does not prove that the evidence introduced by him was false or fabricated."

In *People v. Malaspina*, 57 Cal. 628, the following instruction was held to be reversible error:

"That an unsuccessful attempt to prove an *alibi* is always a circumstance of great weight against the prisoner, because the result to that kind of a defense implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them, if they remain uncontradicted."

In *State v. Byers*, 80 N. C. 426, the judgment was reversed for the sole reason that the court erred in one feature of his charge to the jury. In stating the case the court said: "His honor charged the jury: 'If in view of all the evidence in the cause they should believe and find that the defendant in alleging an *alibi* was guilty of falsehood and misrepresentation as to his whereabouts, such falsehood might be considered by them as an additional evidence of guilt,' and upon this direction of the judge an assignment of error is made." This being the only part of the charge that referred to the *alibi*, the court held that too much prominence was given to the idea, that the *alibi* was founded on falsehood; whereby the jury might have been misled and understood that part of the charge to be an opinion on the weight of the evidence.

*Falsity in an alibi should not be considered either proof of guilt or as a circumstance of such proof.*—In 1900 a father and son were put upon trial in the Criminal Court of Cook County charged with murder. Each of them claimed that he was not present at the time and place of the homicide. The son said that he was so intoxicated he could give no account of his whereabouts; and several witnesses testified to his coming home that evening in a state of intoxication and remaining at home during the rest of the night. During the trial a young man approached one of the attorneys for the defendants and said that he came to court to get a few ideas on practice, as he was to be the prosecuting attorney in a mock trial at the school or academy he attended. That he recognized the defendant as a person he met one night in a state of intoxication and had assisted home. That an entry in a memorandum book fixed that date as the night of the homicide. He said that he was well acquainted with the judge who had presided at an oratorical contest that the young man had taken part in. He was accepted as a witness, and as he took the witness stand was pleasantly greeted by the presiding judge. His testimony in the direct was very satisfactory; but on cross-examination became an utter failure. He admitted that several of his statements were absolutely false. The judge ordered him to be held for perjury. His false evidence had a crushing effect; for al-

though the father was acquitted, a verdict was rendered against the son of guilty of murder and the penalty fixed at fourteen years. The probabilities are very strong that an innocent young man was convicted simply through the false testimony of this officious intermeddler.

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PEOPLE v. PORTENGA.

— Mich. — 96 N. W. Rep. 17.

Decided July 14, 1903.

**ALIBI:** \* *Instruction directing the jury to scrutinize the evidence in such defense.*

An instruction advising the jury to "scrutinize any evidence in relation to the *alibi*;" and telling the jury that "*alibi* is a defense easily proven and hard to disprove; therefore, you will be careful and cautious in examining the evidence bearing upon the question of *alibi*," is not an instruction to discredit the defendant's testimony; nor does it indicate that they are to be controlled by the views of the court. Such instruction may be proper or improper according to the case made out; and it is not reversible error where the evidence does not appear in the record.

Exceptions from the Circuit Court of Muskegan County; Hon. Fred J. Russell, Judge.

John Portenga being convicted of an assault with intent to commit rape, appeals. Affirmed.

*F. W. Cook*, for the appellant.

*George S. Lovelace*, Prosecuting Attorney, and *Charles B. Cross*, Assistant Prosecuting Attorney, for the People.

CARPENTER, J. Defendant was convicted of committing an assault with intent to commit the crime of rape. His defense was an *alibi*. He asks to have the conviction set aside on the ground that the court erred in charging the jury as follows: "The defense in this case, gentlemen—one of the defenses introduced here, or a train of circumstances that has been presented here—tends to show an *alibi* of the defendant here, as claimed by the defendant. That is a defense which is legiti-

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mate. If it is true that this defendant was not in a condition so that he could have committed the crime, that should be a perfect defense, and would be a perfect defense; but in the consideration of that class of defenses, gentlemen, it is necessary for you to take into consideration the facts, and it is your duty as jurors to examine carefully the evidence given on that point—scrutinize any evidence in relation to the *alibi*. An *alibi* is a defense that is easily proven and hard to disprove; therefore you will be careful and cautious in examining the evidence bearing upon the question of *alibi*. I say, if it is established, and you believe the evidence—in other words, if you believe this party was in a position so that he couldn't have committed the crime—of course that would be an absolute defense.”

It is insisted that the court erred in telling the jury to “scrutinize any evidence in relation to the *alibi*. An *alibi* is a defense that is easily proven and hard to disprove; therefore you will be careful and cautious in examining the evidence bearing upon the question of *alibi*.” This language did not instruct the jury to discredit the defendant's testimony, nor did it indicate to them that they should be controlled by any supposed view entertained by the court. It simply cautioned the jury to carefully examine that testimony. Cases might arise in which it would be unnecessary, and perhaps improper, to extend such a caution; but, as the record in this case does not contain the testimony referred to, we are bound to assume, under the authority of *People v. Tice*, 115 Mich. 219, 73 N. W. 108, 69 Am. St. Rep. 560, that this was a case in which it was proper to extend it.

The exceptions of defendant are therefore overruled, and the court directed to proceed to judgment. The other Justices concurred.

## GAINNEY v. STATE.

42 Fla. 607—29 So. Rep. 405.

Decided July 11, 1900.

**BAIL:**\* *HOMICIDE: Probability of guilt in itself not sufficient cause for denial of bail.*

Section 9 of the Declaration of Rights in the Florida Constitution of 1885 provides that "all persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great." Where, in a proceeding by *habeas corpus* brought by a party charged with murder in the first degree to test his right to bail, it appears from the evidence that there is only a "probability" of the guilt of the accused, he is entitled to bail. (Syllabus by the court.)

Error to the Circuit Court of Baker County; Hon. Rhydon M. Call, Judge.

Isaac Gainney applied for a writ of *habeas corpus*, that he might be admitted to bail. Writ denied and the relator brings error. Reversed.

*George U. Walker, L. E. Wade and B. D. Hiers*, for the plaintiff in error.

*William M. Lamar*, Attorney-General, for the State.

**PER CURIAM.** The plaintiff in error, being in custody under an indictment found by the grand jury of Baker County, charging him with murder in the first degree, sued out a writ of *habeas corpus* from the Circuit Court for the purpose of testing his right to bail. After hearing the evidence for the State and for the defense, the circuit judge entered the following judgment: "Be it remembered that on this 11th day of May, A. D. 1900, in obedience to the writ of *habeas corpus* heretofore allowed by me as judge of said Circuit Court in this behalf, U. C. Herndon, sheriff, to whom said writ was directed, appeared before me at the court house in Jacksonville, Duval County, Florida, having with him the body of the said Isaac Gainney, together with the said writ and his return as such sheriff there-

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on; and thereupon the allegations and proofs of said Isaac Gainey, defendant, and the said State of Florida, plaintiff, in said above-mentioned cause, wherein said Isaac Gainey is indicted for murder, having been heard and fully understood; and it appearing that said Isaac Gainey, at the time of the issuance of said writ, was lawfully detained by said U. C. Herndon as sheriff of said County of Baker by process in due form issued under said indictment in said Circuit Court, charging said Isaac Gainey with the murder of one Jeff Knabb; and it further appearing that said defendant is not entitled to bail, and ought not to be discharged, but ought to be remanded to the custody of said sheriff and to the jail of said County of Baker, for the reason that, in my opinion, he is probably guilty of said charge of said murder,—it is therefore considered and ordered by the court that the said Isaac Gainey be remanded to the custody of said U. C. Herndon, sheriff of said County of Baker, to be held and detained by him in the jail of said county until further order of said court." To this judgment the said Gainey sues out writ of error to this court.

We conclude from the recitations of the circuit judge in the judgment entered that the proofs admitted established only a "probability" of the guilt of the accused. Conceding to this finding the weight due it from this court, we see nothing in the record that would justify us in adjudging it to be erroneous. Section 9 of the Declaration of Rights in our Constitution provides that "all persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great." Where the proofs in such a case go no further than to establish a "probability" of guilt, they are not sufficient either to sustain a verdict of conviction or to call for a denial of bail.

The judgment of the court below is reversed, with directions to admit the plaintiff in error to bail in such sum as may be prescribed by the circuit judge.



## EX PARTE SMITH.

79 Miss. 373—30 So. Rep. 710.

Decided Nov. 25, 1901.

**BAIL:**\* **HABEAS CORPUS:** *Assault and battery resulting in death—Justice holding accused to grand jury—Scope of writ of habeas corpus—Practice.*

1. Where an aggravated assault resulted in death, the justice was justified in holding the accused to await the action of the grand jury; and his action in declining to assume original and final jurisdiction, is not subject to review on a writ of *habeas corpus*.
2. In such case bail in the sum of \$500 is not excessive.

Appeal from Circuit Court of Washington County; Hon. Frank E. Larkin, Judge.

*Habeas corpus* proceedings in behalf of Bud Smith. Writ denied and case appealed. Affirmed.

*C. J. Jones*, for the appellant.

*Monroe McClurg*, Attorney-General, for the State.

**TERRAL, J.** Bud Smith, for the commission of an aggravated assault and battery, was by a justice of the peace of Washington County bound over to the Circuit Court in the sum of \$500, and, failing to give said bond, he was given into the custody of the sheriff of said county. He brings this suit of *habeas corpus*, and asks that his case be remanded to the justice of the peace for trial, and, if that prayer be not granted, that his bail bond be reduced.

The perfect propriety of the action of the justice of the peace will be best shown by a relation of the facts. Bud Smith was prosecuted before Justice of the Peace Basket upon an affidavit charging that Smith, in said county, on the 21st day of September, 1901, "did commit an assault and battery on one Richard Slayton by beating him with his fist and kicking him in the stomach, thereby causing the death of said Slayton, against the peace and dignity of the State of Mississippi." The evidence showed that Smith claimed that Slayton owed him a

\*See BAIL in Table of Topics.

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dime, which Slayton agreed to pay, and went to get the money. He did not return immediately, but fell into a conversation with Sanders, where Smith, going in search of him, found him, and, going up behind him, without saying a word, struck him with his fist on the back of the head, turned him around, fought him some fifteen or twenty minutes, when he hunched him in the stomach with his knee, and of the injuries Slayton soon died. We know of no law that would authorize a chancellor or circuit judge, by writ of *habeas corpus* or other process, to compel a justice of the peace, who had bound over to the Circuit Court a person for even a simple misdemeanor, to take jurisdiction anew, and make a final trial of the case. If the justice of the peace for any cause should decline to try a person duly charged before him with a misdemeanor, but instead should bind him for his appearance to the Circuit Court, it would be a matter for which complaint by *habeas corpus* may not be made. In the serious matter here presented to Justice Basket, which, under a proper indictment therefor, would subject Smith to the charge of murder, and to a trial for such crime, it was but common prudence on his part to bind the offender to the Circuit Court, where the charge can be settled under the advice of learned counsel. The offense of assault and battery may be punished with a fine of \$500 and six months' imprisonment in jail, and, if Smith be guilty of assault and battery only, the bond required is not excessive. Affirmed.

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EX PARTE LOCKLIN.

Tex. Court of Crim. App.—72 S. W. Rep. 585.

Decided Feb. 25, 1903.

BAIL: \* MURDER: *Circumstantial evidence corroborating testimony of accomplice not conclusive beyond a reasonable doubt.*

While the testimony of the accomplice shows a capital case, the corroborating circumstances are controverted and not conclusive beyond a reasonable doubt; hence bail should be allowed.

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\*See BAIL in Table of Topics.

Appeal from the District Court of Llano County; Hon. Clarence Martin, Judge.

Application of Sam Locklin for writ of *habeas corpus*. Bail denied. Relator appeals. Reversed.

*McLean & Spears* and *M. D. Slator*, for the appellant.

*James Flack* and *Howard Martin*, Assistant Attorney-General, for the State.

HENDERSON, J. Relator, being indicted for the murder of Rountree, applied to the District Judge of Llano County for the writ of *habeas corpus*, which was granted, and after trial bail was refused, and he now appeals to this court. We have carefully examined the facts adduced on the hearing, and in our opinion the proof is not evident that relator is guilty of a capital felony; that is, while the testimony of the accomplices shows nothing less than a cold-blooded assassination, the evidence corroborative of their testimony is circumstantial, consisting of the declarations and conduct of relator. These, it is insisted on the part of the State, have a direct bearing on the guilt of relator, and tend to show his connection with the offense. On the contrary, appellant insists that they in no wise connect him with the crime, and have no bearing thereon. This is a controverted question, and we hold that the proof is not evident; that is, absolutely clear and conclusive beyond any reasonable doubt upon this question. It is not necessary here to determine whether or not we would sustain a verdict of murder in the first degree on this evidence. We merely hold that, in our judgment, the evidence is not of that character which makes the guilt of relator of a capital felony evident. The judgment is reversed, and the bail of relator is fixed at the sum of \$8,000, upon the giving of which in the terms and conditions of law he is to be released.

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## EX PARTE MAJORS.

— Miss. — 34 So. Rep. 151.

Decided April 20, 1903.

BAIL: \* HOMICIDE: *Extenuating circumstances—Bail allowed.*

Deceased under influence of liquor attempted to chastise his son with a heavy piece of wood. Being remonstrated with by the defendant, advanced on him and was shot by the defendant. *Held*, that under rule that all offenses are bailable "except capital offenses when the proof is evidence or presumption great," the defendant was entitled to bail. Bail fixed at \$1,000.

Appeal from the Circuit Court of Leake County; Hon. John R. Enochs, Judge.

The Court below denied bail, when prayed for upon writ of *habeas corpus*. Relator appeals. Reversed.

O. A. Luckett, for the appellant.

J. N. Flowers, Assistant Attorney-General, for the State.

PRICE, J. In February, 1901, the grand jury of Leake County indicted Will Majors for the murder of his brother-in-law, J. D. McDuff. He was arrested and placed in jail March 26, 1902. On the first day of the August term of 1902 the district attorney entered a *nolle prosequi*, and on the 19th of August, 1902, Majors was again indicted for the murder of McDuff, arraigned, and pleaded not guilty, announced ready for trial, and demanded a special venire to try the cause. But relator has for some cause, not made known in the record, not been tried, and is still confined in jail. He sued out a writ of *habeas corpus*, and the same was heard December 9, 1902, and the relator remanded to jail without the benefit of bail. McDuff died December 17, 1900, from a gunshot wound at the hands of Will Majors. The deceased and his son, Walter McDuff, had returned from Canton the day of the killing, where deceased had bought a new buggy. Before reaching home, the deceased got out of his buggy, and obtained a seat in Dan McDuff's<sup>1</sup> buggy, and his son, Walter, drove on

\*See BAIL in Table of Topics.

<sup>1</sup> Evidently "Dan McDuff's" should be Dan Majors; but we give it as in opinion on file.

home alone. Father and son were both drinking, and just before reaching deceased's home Walter's horse ran away and broke the buggy, and the horse, with the harness and shaft attached, ran up to the residence of deceased, creating great excitement among the members of deceased's family. The deceased, when he overtook Walter with the broken buggy, violently threw the boy upon the ground, and beat him, when Dan Majors pulled him off, and advised Walter to run. The relator, Will Majors, heard the screams of Mrs. McDuff and daughters, and ran over to investigate, and aid them in their trouble. The deceased and Dan Majors soon came up, when the deceased, with an oath, announced to his wife and children that he had killed his son, Walter. He soon found it necessary to correct this story, and explained to his wife that the horse had run away, and thrown Walter out, but that he was not killed. The deceased, his wife, Mr. Anderson, Dan Majors, relator, and others started out to look for Walter, and found him in the woods, about 200 yards from the broken buggy. Mrs. McDuff called Walter. He answered, and she and Mr. Anderson went to him, and advised him to come back to the road, and the deceased would not whip him. Relator and others in the meantime were standing in the road and about the broken buggy. When Walter reached the road, his father pulled up a water-soaked cypress board one and one-half to two inches wide, twenty to thirty inches long, and, using some vile epithet, started onto his son. Mr. Anderson said to deceased, "You are in no condition to whip the boy, and the boy is in no condition to be whipped." Dan Majors said to the deceased, "Come now, Jesse, listen to reason." One of the witnesses says that Will Majors at this time said, "You had better not put your hands on him." The deceased answered, "It is none of your damn business." Other witnesses say that the deceased and Will Majors were from twelve to fifteen feet apart, when deceased picked up a board, and Will Majors said to him, "Don't do that, Davis," and McDuff said, "What in the hell have you to do with it?" and began advancing on Will Majors with the board, and, when within five or six feet of relator, relator fired the fatal shot, and deceased fell on his face toward relator. Sev-

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eral witnesses testify that the cypress board was very heavy, and was a deadly weapon. As the gun fired, the relator said, "I told you not to come on me." Relator was out with his gun that afternoon, hunting, when he heard the screams at McDuff's residence, and went there, knowing nothing of the cause. The testimony is that the deceased was drinking, and when in that condition was dangerous, and was a much larger and stronger man than the relator.

We are fully convinced that the learned judge was in error in remanding the prisoner to jail without the benefit of bail. Our Constitution (section 29) provides excessive bail shall not be required. "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or presumption great." In *Ex parte Wray*, 30 Miss. 673, this court, in passing upon the same provision, said "that, if a well-founded doubt of guilt can ever be entertained, then the proof cannot be said to be evident, nor the presumption great, and in such case bail must be granted." In *Ex parte Bridwell*, 57 Miss. 41, this court approves the rule announced in the *Wray Case*, but disclaims application of the rule to the facts of that case. There can be no difference of opinion as to what the law is on the subject of bail in capital cases in Mississippi. The chief trouble is encountered when we undertake to apply the law to the facts of particular cases. We refrain from commenting upon the facts. But, with the record before us, we are constrained to reverse the judgment of the lower court, and the relator is admitted to bail.

This case having come up on pauper's oath we fix the bond at \$1,000.

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EX PARTE COTTON.

Tex. Court of Crim. App.—53 S. W. Rep. 632.

Decided Nov. 1, 1899.

BAIL:\* RAPE: *Rule in capital cases.*

Carnal intercourse with an unmarried female under fifteen years of age is a capital case; and while bail will be allowed unless the proof is evident, in this case from the record it is denied.

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\*See BAIL in Table of Topics.

Appeal from the District Court of Robertson County; Hon. W. G. Taliaferro, Judge.

J. M. Cotton prays bail by petition for a writ of *habeas corpus*. From a judgment remanding him he appeals. Affirmed.

*Henderson, Streetman & Freeman*, for the appellant.

*Robert A. John*, Assistant Attorney-General, for the State.

DAVIDSON, P. J. Relator was indicted for rape. After being arrested, he resorted to *habeas corpus* proceedings for the purpose of obtaining bail. Upon a hearing under the writ he was remanded to custody, and from this judgment prosecutes an appeal.

The indictment charges relator with having had carnal intercourse with a girl under fifteen years of age, she not being his wife. We are of opinion that the same rule with reference to bail would apply in this case as in robbery where that offense has been made a capital offense by the statute. In *Epps' Case*, 35 Tex. Cr. R. 409, 34 S. W. 113, it was said: "The proof must be evident that the robbery was committed, that appellants are the guilty parties, and that they used firearms in its commission. The proof upon each of these propositions must be evident." So, in this case, the proof must be evident that the carnal intercourse was had by relator with the prosecutrix, and that she was under fifteen years of age, and not his wife. The proof upon each of these propositions, in our judgment, must be evident. We have examined the record, and, without entering into a discussion of the facts, we are of opinion that the judgment of the court below must be affirmed, and it is so ordered.

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## IN RE WEST.

10 N. D. 464—88 N. W. Rep. 88.

Decided Dec. 12, 1901.

**BAIL:**\* *Construction of constitutional provision in regard to bail in capital cases—Judicial discretion—Practice.*

1. *Habeas corpus* to obtain bail. Construing section 6 of the State Constitution, and section 8446 Rev. Codes 1899, *held*, that in capital cases the accused is entitled to bail before trial, as a matter of absolute right, unless the proof of guilt is evident, or the presumption thereof is great.
2. *Held*, further, that in other capital cases bail may be granted or withheld as a matter of judicial discretion, to be exercised either by the District or the Supreme Court, or by the judges thereof.
3. *Held*, further, upon the facts here presented and for reasons stated in the opinion, that bail will not be granted in this case upon this application, either as a strict legal right or as a matter of discretion.

(Syllabus by the court.)

Supreme Court of North Dakota. Application of William E. West, for release upon bail by writ of *habeas corpus*. Denied.

*Cochrane & Corliss*, for the petitioner.

*J. B. Wineman*, State's Attorney.

WALLIN, C. J. In this proceeding the petitioner, William E. West, by his attorneys, Messrs. Cochrane & Corliss, has presented to this court a verified petition, asking that a writ of *habeas corpus* shall issue out of this court, directed to the sheriff of Grand Forks County, commanding him to produce before this court the body of the petitioner, and to show cause by what authority the petitioner is detained without bail, and this to the end that the petitioner be admitted to bail by this court. At the time of the presentation of said petition the State was represented by J. B. Wineman, Esq., State's Attorney for Grand Forks County, and the petitioner was represented by his said attorneys, Cochrane & Corliss; whereupon it was stipulated between counsel in open court that the writ need not issue in the first instance, and that the facts and merits of the application

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\*See BAIL in Table of Topics.



should be presented to the court, and heard and determined by the court, upon the application for the writ, and that the evidence and matters of fact, as embodied in the petition for the writ, should be held and considered by the court in all respects as if the same had been embraced in a return made by the sheriff in response to the writ.

The uncontroverted facts, as set out in the petition as grounds for the relief which is sought by the petitioner, are as follows: Upon a warrant of arrest issued by a justice of the peace of Grand Forks County, the petitioner was arrested and brought before said justice of the peace on the 3d day of December, 1901; whereupon, after a preliminary examination of the petitioner was had before said justice of the peace, an order and finding was entered in the docket of said justice of the peace to the effect that the crime of murder had been committed in Grand Forks County, and that there was probable cause to believe that the petitioner was guilty thereof; and said finding and order also embraced the following provision: "It is therefore ordered that the defendant, W. E. West, be held to the District Court of Grand Forks County, N. D., to answer to any indictment or information that may be filed against him touching said charge, and be committed to the custody of the sheriff of said county without bail." Pursuant to said order and finding of the justice of the peace, a warrant of commitment was issued by the justice, under which the sheriff received the petitioner into his custody, and now holds the petitioner as a prisoner. The petition further shows that on the 4th day of December, 1901, the petitioner made application to the District Court of the First Judicial District, Hon. Charles J. Fisk presiding, for a writ of *habeas corpus*, to the end that the petitioner might be admitted to bail upon said charge, and a hearing was then had before said District Court upon such petition, upon all the evidence adduced and proceedings had before the justice of the peace, and upon no other facts and evidence, said evidence consisting of the testimony adduced upon the part of the State at the preliminary examination, and the same evidence and proceedings, and none other, are embodied in the petition presented to this court. At the hearing had upon the applica-

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tion made to the District Court, the petitioner and the State were represented by their said counsel, and after hearing counsel the District Court refused to issue the writ, and refused to either admit the petitioner to bail or to fix the amount of his bail, and said court directed that the petitioner be continued in the custody of the sheriff without bail.

Upon this state of facts the question first arising upon this application is whether the petitioner is entitled to bail as a matter of strict legal right. Counsel for the petitioner contend that he is, and cite Section 6 of the State Constitution and Section 8446 of the Revised Codes of 1899 in support of their contention. The first sentence of Section 6 of the Constitution is as follows: "All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great." In our judgment, the Constitution, by its own terms, guaranties the right to bail before trial in capital cases, unless the proof of the commission of the capital offense is evident or the presumption thereof is great; and we are further of the opinion that said section of the State Constitution does not forbid bail in a capital case where the proof of guilt is evident or the presumption thereof is great. As we read Section 6 of the Constitution, that section is silent as to granting or withholding bail in a capital case where the proof of guilt is evident or the presumption thereof is great. On the one hand, the Constitution itself does not give the right to bail in the class of cases last mentioned; and, on the other hand, the Constitution does not inhibit the legislature from doing so. In support of our views upon this feature of the case, we cite *People v. Tinder*, 19 Cal. 539, 81 Am. Dec. 77. In that case Mr. Justice Field, speaking for the court, and in construing a constitutional provision identical with that under consideration, uses the following language: "The admission to bail in capital cases, where the proof is evident or the presumption is great, may be made a matter of discretion, and may be forbidden by legislation, but in no other cases. In all other cases the admission to bail is a right which the accused can claim, and which no judge or court can properly refuse."

We are therefore required to examine the evidence presented

upon this application, with a view of ascertaining whether, under the Constitution and as a matter of strict legal right, the petitioner is entitled to bail. In performing this duty all members of this court have given the evidence and the law applicable thereto a careful consideration, and the conclusion has been reached that the petitioner is not entitled to bail as a matter of strict legal right. We have also reached the further conclusion that any extended presentation or discussion of the evidence at the hands of this court, in advance of the trial of the case upon the merits, would be manifestly improper. In capital cases the question of whether the homicide resulted from the premeditated act of the accused is ordinarily one of fact, to be determined by the jury under proper instructions to be given to the jury by the trial court. In such cases the pivotal question of the grade of the homicide ought not, in our judgment, to be made the subject of collateral inquiry and determination in advance of the trial, except in cases where there is little or no ground for a difference of opinion as to the grade or degree of the homicide. In our opinion, this court would be trenching upon delicate and dangerous ground should it attempt to pass upon the crucial question to be determined hereafter by the jury impaneled to try and decide upon the entire matter of the guilt or innocence of the accused, including the matter of the nature and the degree of the homicide. Upon such considerations we are constrained to refrain from any discussion of the evidence or the law applicable thereto.

But, in ruling that the petitioner is not entitled to bail as a matter of strict legal right, this court does not hold that bail may not be granted the petitioner at all or for any reason. In our opinion, the petitioner, under Section 8446, *supra*, is entirely at liberty to apply either to this court or to the District Court for bail. But in that event the application may be either granted or refused, in the exercise of a sound judicial discretion. In the case as now presented to this court, counsel have insisted upon the right to bail as a matter of strict legal right, and have omitted to present to this court any facts or considerations of a special nature which would appeal to the discretion vested in this court, or which would in any way enlighten this court with

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respect to the granting or refusing of bail under the circumstances surrounding this case. Hence we are not in a position in this case to grant bail at the present time. But our refusal to do so does not operate as a bar to any future application for bail by the petitioner. He is entirely free to make another application; but, in the event of his doing so, the application should be first made to the District Court, as that tribunal is convenient to the parties, and is also in a better position to understand existing local conditions and all the facts and circumstances bearing upon the matter of granting or refusing bail in this particular case.

In reaching the conclusions which have been advanced in this opinion there has been entire unanimity of opinion on the part of the members of this court, except upon the point of whether the petitioner is entitled to bail as a matter of strict legal right. As to that point a conclusion is reached by a divided court.

The writ prayed for in the petition is denied.

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JERNAGIN v. STATE.

118 Ga. 307—45 S. E. Rep. 411.

Decided Aug. 11, 1903.

BAIL:\* MURDER: *Discretion of judge.*

1. Whether based on a *prima facie* case of murder, on evidence of probable guilt, on the sickness or physical condition of the defendant, or on other cause, the granting or refusal of bail in capital cases is peculiarly within the discretion of the judge of the Superior Court, and will not be controlled, unless it has been manifestly and flagrantly abused. There was no abuse of discretion in the present case.  
(Syllabus by the court.)

Error to the Superior Court of Bartow County; Hon. R. G. Mitchell, Judge.

Petition of J. H. Jernagin for release on bail. Bail denied. He brings error. Affirmed.

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\*See BAIL in Table of Topics.

*Hendricks & Harrison*, for the plaintiff in error.

*W. E. Thomas*, Solicitor General, and *H. B. Peebles*, for the State.

LAMAR, J. The magistrate having committed Jernagin for murder, the defendant applied to the judge of the Superior Court for bail. In his petition he admitted the killing, stated that the only eyewitnesses were his wife and two infant children, and claimed that he had once proceeded to the nearest town, and surrendered himself to an officer. He alleged that the deceased was a man of great physical strength, and of violent temper, and had threatened to kill the plaintiff in error, who acted in self-defense. The petitioner also alleged that he was weak of body, and suffered greatly from sickness, and that his health would be seriously impaired by confinement in jail during the summer months, and until the next term of court. After hearing evidence, the judge refused to allow bail. In *Lester v. State*, 33 Ga. 192, and *Corbett v. State*, 24 Ga. 391, the application for bail was in term and to the court. It may be that under Pen. Code, § 933, the judge of the Superior Court is not acting as a *habeas corpus* court (*Carter v. Janes*, 96 Ga. 280, 23 S. E. 201), and that a bill of exceptions would no more lie to his decision than would a *certiorari* from an order of commitment by a magistrate. But as that question is not put in issue in this record, we content ourselves with emphasizing, if possible, what was said in *Lester v. State*, 33 Ga. 192. Whether based on a *prima facie* case of murder, or evidence of probable guilt, or on the sickness or physical condition of the defendant, or on any other cause, in a *habeas corpus* proceeding, or on any other proceeding which may be brought to this court by bill of exceptions, the granting or refusing of bail in capital cases is a matter peculiarly within the discretion of the judge of the Superior Court, and will not be controlled, unless it has been manifestly and flagrantly abused.

Judgment affirmed. All the Justices concur, except TURNER, J., not presiding.

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## EX PARTE HILL.

51 W. Va. 536—41 S. E. Rep. 903.

Decided June 7, 1902.

**BAIL:\*** AFTER CONVICTION: *Review of common law and statutes—When bail may be allowed pending an appeal.*

1. After conviction of felony there can be no allowance of bail by this court or a Circuit Court, except that for some cause extraordinary, not growing out of, but independent of, the criminal act, as for sickness, bail may be granted before conviction, or after it, pending a writ of error, and before actual commitment to the penitentiary. The party must be laboring under a present, painful, severe and dangerous disease, either caused or aggravated by his imprisonment, and there must be strong probable reason, not mere fear, but based on facts, to apprehend that continued imprisonment will be fatal, or at least cause permanent grave injury to health.
2. The Supreme Court of appeals has jurisdiction to award a writ of *habeas corpus* having for its sole purpose the obtaining of bail in a felony case, and to grant bail upon it. Bail may be granted on mere motion in the Circuit Court, under the statute.  
(Syllabus by the court.)

Application of A. T. Hill, for a writ of *habeas corpus*, praying that he be allowed bail. Writ refused.

BRANNON, J. Hill, having been convicted and sentenced to the penitentiary for felony for receiving stolen goods, obtained a writ of error, and then petitioned the Circuit Court of Marion County to be allowed bail until the decision of the writ of error; and, that court having refused bail, he comes to this court by petition for a writ of *habeas corpus*, in order to have this court grant him bail.

The case does not involve the question discussed in *Ex parte Eastham*, 43 W. Va. 637, 27 S. E. 896,—whether upon *habeas corpus*, seeking bail only, this court can grant bail before conviction. In that case the indication was, I think now, a correct indication that such jurisdiction exists. Nor does this case involve the question of the power of this court, when it has before it a *habeas corpus* seeking discharge on the claim of unlaw-

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\*See BAIL in Table of Topics.

fulness of imprisonment, and refuses discharge, to admit to bail. I think that in such case it can, in a proper case, grant bail. Hurd, Hab. Corp. 432; 3 Am. & Eng. Enc. Law (2d Ed.) 666. The Code of 1899, c. 111, § 6, expressly recognizes this power, in saying that upon such a writ the court "shall either discharge or remand him or admit him to bail." The present case presents the question whether this court can, upon a writ of *habeas corpus* not seeking discharge from unlawful imprisonment, but seeking only bail after conviction of felony pending a writ of error, grant such bail. We may safely say that by common law bail might in proper cases, in sound discretion, be granted at any stage of the case, before or after indictment,—indeed, after conviction pending appeal, so application is made before actual commitment to the prison under the sentence. 3 Am. & Eng. Enc. Law (2d Ed.) 671, 673; Enc. Pl. & Prac. 206; Hurd, Hab. Corp. 435, 444; Church, Hab. Corp. §§ 417, 419; Ral. Cr. Proc. § 37. But in Virginia the Code of 1819, c. 167, § 1, allowed the General Court or Superior Court to "admit to bail any person before conviction;" and Section 2 (being an act dating back to 1785), provided that "no person shall be bailed after conviction of any felony." Thus far back it was the policy of Virginia not to bail after conviction. The Code of 1849 pursued this policy in Section 6, c. 204, by allowing justices to bail a person "charged with, but not convicted of an offence," and by saying "a Circuit Court, or any judge thereof, may admit any person to bail before conviction." The West Virginia Code likewise always has limited the power of justices to bail persons "charged with, but not convicted of an offence not punishable with death," and grants to Circuit Courts and their judges power "to bail before conviction." Code, c. 156, § 6. It is noted that the positive provision of the Code of 1819 against bail to one convicted of felony is omitted in later Virginia and West Virginia Codes, and from this counsel argue that, that prohibition having been repealed, the common law is revived, and that bail may be allowed after conviction. We do not concur in this position. That express prohibition was surplusage and tautology, because the words of Section 1, "may admit to bail any person before conviction," tell plainly enough the intent to limit bail to one not convicted, and deny

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it to one who can no longer be presumed to be innocent, but who is guilty by judicial ascertainment. The expression of power to bail before conviction excludes the power to bail after conviction. If the lawmaker intended to grant bail after conviction, why does not the statute simply say that a court "may admit any person to bail," omitting the words "before conviction?" These words mean something. They can have no other meaning than to limit power to bail to cases before conviction. The very fact that the common law allowed bail after conviction shows an intent by these words "before conviction" to depart from the common law. The legislature has, as to this matter, laid down the rule, and no court can repeal its plain words. A party convicted still remains presumably guilty during his appeal until reversal, and the law intends to take no security from him, as the temptation to defeat the law by escape is then greater than ever. In most of the States the right to bail is given by constitution, with exception of certain cases; but in this State such is not the case, and it is a matter of sound discretion to grant or refuse. And where such constitutional provisions exist, they seem to have no operation after conviction, to give bail as a matter of right after conviction,—but only as of discretion. 3 Am. & Eng. Enc. Law (2d Ed.) 675; Church, Hab. Corp, §§ 417, 418; Hurd, Hab. Corp. 445. But whilst it seems clear that our statute limits bail to persons not yet convicted, still that applies only to the circumstances connected with the offense and is tested by the party's guilt or innocence; and the statute does not, in such limitation, touch those cases where extraordinary circumstances, independent of the merits of the case, call for bail. "The illness of the prisoner is such a circumstance, and the humanity of our law makes it a consideration which should, under all circumstances, regardless of the charge upon which the prisoner is confined, or the stage of the proceeding at which the application is made, influence the court to exercise its discretion and admit to bail." 3 Am. & Eng. Enc. Law (2d Ed.) 677; Church, Hab. Corp. § 410. Cases of binding authority upon us make grave sickness an exceptional ground of bail. *Semmes' Case*, 11 Leigh, 665; *Archer's Case*, 6 Grat. 705.



We do not fail to realize that it may be charged that we are putting an exception into the statute not found in it, but considerations of very apparent force answer this charge. The word "conviction," in the statute, shows that the bail spoken of is that relating to the criminal act, tested by its circumstances. Again, I think that this is an instance calling for the application of the rule of statutory construction, that, though a thing may be within the letter of a statute, yet, if it is not within its spirit, the statute does not include it. Now, it seems reasonably probable that the legislature did not, for instance, mean to disable a court granting a suspension, to enable the convict to apply for a writ of error, from allowing bail where the bail is not tested by his guilt, but he is dying from imprisonment and disease. Under this rule, grave necessity for bail must be shown. In the *Semmes' Case* it is laid down that the prisoner must be "laboring under a present, painful, severe, and dangerous disease, caused by his imprisonment, and likely to be so aggravated by a continuance thereof as probably to terminate fatally." The evidence should clearly show that death or permanent ill health will result from a continuance of confinement. 3 Enc. Pl. & Prac. 212. "It is only where illness has been caused or aggravated by the imprisonment, and there is probable reason to apprehend that further imprisonment would be fatal, or at least cause permanent injury to health, that the application should be granted." 3 Am. & Eng. Enc. Law (2d Ed.) 677. The case does not come up to this standard. It is shown by some affidavits that Hill is inclined to stoutness or obesity, and his heart affected by fatty degeneration, and that, in the opinion of two physicians, continued confinement "for a considerable time" would permanently injure his health and cause death. How long will it take to produce this result? It is mere opinion. It is not shown that his condition was caused by imprisonment. And a physician attending the jail (the health officer of the county) says he thinks the ailment attributed by those physicians to confinement is curable by treatment, and not likely to produce the danger feared. So as to danger in future there is conflict of medical opinions. And should the prisoner grow worse, the circuit judge can again consider the

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case; and I do not see why, if the jail is bad and dangerous, removal could not be made under Sections 47, 48, c. 41, Code. There is difference of opinion as to the condition of the jail.

Does this court have jurisdiction to grant bail in a proper case? I have had, and have yet, some question, because the Code gives a Circuit Court jurisdiction; but the Constitution gives this court original jurisdiction in *habeas corpus*, and that writ has been long used as a process to obtain bail. We refuse the writ.

Writ refused.

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EX PARTE COLLETTE et al.

106 La. Rep. 221—30 So. Rep. 746.

Decided Nov. 26, 1901.

BAIL PENDING APPEAL: \* *Allowed if sentence is not for death or for hard labor.*

1. Construing Article 12 of the Constitution of 1898 and section 1007 of the Revised Statutes together, it is *held* it is only where persons convicted of crime shall have been sentenced to death or to imprisonment at hard labor that such persons are to be kept in confinement notwithstanding an appeal taken in their case.
2. Where the sentence pronounced is not that of death or imprisonment at hard labor, the convict is entitled, upon application, to be released on bail pending the appeal.
3. But where an accused party has been convicted of an offense the sentence for which, yet to be pronounced, may be imprisonment at hard labor, he is not entitled to bail between the time of his conviction and that when sentence is to be passed.
4. The term "imprisonment at hard labor," where used in article 12 of the Constitution, and in section 1007, Rev. St., means imprisonment at hard labor in the penitentiary. It does not mean the work on public roads, bridges and other public works authorized by article 292 of the Constitution.

(Syllabus by the court.)

Petition by B. and M. Collette for writ of *habeas corpus* to release on bail. Petition granted.

A. E. & O. S. Livaudais, for the petitioners.

Walter Guion, Attorney-General, and Albert Estopinal, Dis-

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\*See BAIL in Table of Topics.



jail, notwithstanding any appeal or reprieve, until the final action of the Supreme Court on the appeal, or of the Senate on the reprieve." This section of the act of 1853 was doubtless passed in furtherance of Article 104 of the Constitution of 1852, now Article 12 of the present Constitution of the State. Construing the two together,—the constitutional provision and the statute,—we hold it is only where persons convicted of crime shall have been sentenced to death or to imprisonment at hard labor that such persons are to be kept in confinement notwithstanding an appeal taken in their case. It follows that, where the sentence pronounced is not that of death or imprisonment at hard labor, the convict is entitled, upon application, to be released on bail pending the final determination of his case on appeal. See *State v. Anselm*, 43 La. Ann. 195, 8 South. 583. Contrast Article 108 of the Constitution of 1845 with Article 104 of the Constitution of 1852. See *In re Longworth*, 7 La. Ann. 248. But where an accused party has been convicted of an offense the sentence for which, yet to be pronounced, may be imprisonment at hard labor, he is not entitled to bail between the time of his conviction and that when sentence is to be passed upon him. *State v. Vion*, 12 La. Ann. 688. The term "imprisonment at hard labor," where used in Article 12 of the Constitution, and in Section 1007 of the Revised Statutes, means imprisonment at hard labor in the penitentiary. It does not mean the work on public roads, bridges, and other public works authorized by Article 292 of the Constitution.

It is ordered that the sheriff of the parish of Plaquemines take good and sufficient surety from the prisoners, Baptiste Collette and Meyer Collette, each in the sum of \$300, conditioned to abide the judgment of this court on the appeal they have prosecuted from the verdict and the sentence pronounced against them thereon, as shown by the record of the said appeal (No. 14,201 on the docket of this court), entitled, "*State of Louisiana vs. Baptiste Collette and Meyer Collette*," and to execute the said sentence by undergoing the punishment thereof in the event of the affirmance by this court of the judgment appealed from. It is further ordered that upon furnishing such bond and security the prisoners be released from the present

custody of the sheriff of the parish of Plaquemines, to be again taken into custody by him in the event of judgment adverse to them on the pending appeal. It is further ordered that the bonds so taken by the sheriff be returned to the court *a qua*.

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EX PARTE SCOTT.

Tex. Court of Crim. App.—62 S. W. Rep. 568.

Decided April 17, 1901.

BAIL:\* ASSAULT WITH INTENT TO COMMIT RAPE: *Amount of bail.*

Six hundred dollars is not excessive bail upon an accusation of assault with intent to rape.

Appeal from the District Court of Harris County; Hon. A. C. Allen, Judge.

In the court below W. W. Scott sued out a writ of *habeas corpus* to obtain his release from commitment in default of bail. On hearing, the court reduced the bail to \$600, and the petitioner appealed. Affirmed.

*Brockman & Kahn*, for the appellant.

*Robert A. John*, Assistant Attorney-General, for the State.

DAVIDSON, P. J. Appellant was arrested, charged with an assault with intent to commit rape. It is unnecessary to discuss the statement of facts. The amount of the bond was fixed by the court at \$1,000, which, upon a hearing under the writ of *habeas corpus*, was reduced to \$600, and from this judgment appeal is prosecuted. This bond is not excessive. The judgment is affirmed.

BROOKS, J., absent.

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## SANCEDO v. STATE.

Tex. Court of Crim. App.—70 S. W. Rep. 546.

Decided Nov. 19, 1902.

BAIL:\* ASSAULT WITH INTENT TO MURDER: *Reduction of bail—Alibi.*

The bail was originally fixed at \$2,000, upon writ of *habeas corpus* it was reduced to \$500; but as upon that hearing the only evidence offered on part of the prosecution was the indictment, while the relator gave evidence to sustain an *alibi*, held, that the bail should be reduced to \$250.

Appeal from the District Court of Cameron County; Hon. Stanley Welch, Judge.

Ananacio Sancedo being indicted for assault with intent to murder, and applying for a writ of *habeas corpus*, his bail was reduced to \$500. He appeals. Reversed.

*R. B. Creager*, for the appellant.

*Robert A. John*, Assistant Attorney-General, for the State.

DAVIDSON, P. J. Appellant was arrested on a charge of assault with intent to murder, and his bond originally fixed at \$2,000. Upon the *habeas corpus* trial it was reduced to \$500. From the judgment fixing the latter amount this appeal is prosecuted. The assault in this case was charged to have been made upon Jesse Miller, whom the evidence shows was one of the Texas Rangers camped near the City of Brownsville. There are twelve of these cases pending before the court for reduction of bail. It seems from the history of the cases that Rangers Roebuck, Baker, and Miller had been in the city of Brownsville during the evening, and left for their camp, some mile and a half or three-quarters below said city, about 8:30 o'clock in the evening. Just before reaching their camp they were fired upon from ambush, and Roebuck assassinated. The indictments in the twelve cases pending before us grow out of this transaction, the testimony in all the cases being substantially the same. On the trial the State introduced the indictment pending against each relator, and rested. Relator in this as in

\*See BAIL in Table of Topics.

the other cases proved an *alibi*. The State in no instance undertook to connect defendant with the assault upon the rangers and the assassination of Roebuck, so far as the records show, except by the introduction of the indictment. Being under indictment, the law prohibits a discharge from custody under the writ of *habeas corpus*. As before stated, the bail was fixed at \$500, and, so far as the evidence in the record shows, appellant and his friends are without means to meet this requirement. We therefore reduce the bail to \$250, upon the giving of which, in the terms of the law, relator will be released from custody.

Judgment reversed, and bail fixed at \$250.

NOTE.—*Hernandez v. State*, 70 S. W. Rep. 549, was an appeal from an order of the same court and presiding judge. The opinion was also dated Nov. 19, 1902, and was as follows:

DAVIDSON, P. J. Appellant was charged by indictment with the murder of W. E. Roebuck. On the trial, under the writ of *habeas corpus*, the court fixed the amount of bail at \$3,000. The contention here is that this amount is excessive. The statement of facts shows that the only evidence introduced by the State was the indictment. The testimony for the relator was introduced to prove an *alibi*. Evidence was also adduced to the effect that relator had no property. This was with reference to his ability to give the amount of bail required. It will be seen from this the State introduced no evidence in regard to the merits of the case, and the record before us is without a single fact tending to inculcate relator. But for the inhibition of the statute he might be discharged. An indictment being preferred, discharge cannot be had without bail, under the writ of *habeas corpus*. As the matter is presented, bail will be reduced, and fixed at the sum of \$1,500, upon the giving of which in the terms required by law the officer having him in charge will release relator.

Judgment reversed, and bail fixed at \$1,500.

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### EX PARTE CHOYNSKI et al.

42 Tex. Crim. Rep. 587—61 S. W. Rep. 391.

Decided March 20, 1901.

BAIL: \* PRIZE FIGHTING—Amount of bail.

The prisoners were accused of prize fighting, the statutory punishment being not less than two or more than five years in the penitentiary. The committing magistrate set the bail at \$5,000. The

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grand jury refused to indict; but was reinstructed by the court in relation to the matter. Court below upon *habeas corpus* reduced bail to \$2,500. Held excessive and again reduced to \$1,000.

Appeal from the District Court of Galveston County; Hon. A. C. Allen, Judge.

Joseph B. Choynski and another make application for writ of *habeas corpus* to reduce bail; and from an order reducing bail, fixing the bail at \$2,500, they appeal. Modified.

*Marsene Johnson and John C. Walker*, for the appellant.

*D. E. Simmons*, Acting Assitant Attorney-General, for the State.

DAVIDSON, P. J. Appellants were arrested charged with "prize fighting," and the bond of each fixed at \$5,000. Being unable to give this bond, they resorted to the writ of *habeas corpus*, and the District judge, upon hearing the same, reduced the bail to the sum of \$2,500 each. Appellants claim this amount is excessive, and they are totally unable to give such bond. The record shows their inability to give bond in this amount. The punishment for his offense is not less than two nor more than five years' confinement in the penitentiary. It also shows that the grand jury refused to indict appellants for this offense, and so reported to the court; but that body was re-instructed by the court with reference to the matter, and, the court being still in session, indictment may be returned. Under the statute it seems they are not entitled to their discharge in any event until the adjournment of the grand jury for the term. Under the circumstances we believe the amount of the bail fixed by the trial judge is excessive, and amounts to a deprivation of bail, and we therefore fix the amount of the bail at \$1,000 each; and upon giving bond in this sum, in accordance with the terms of the law, they will be released from custody.

NOTE.—A bar docket of Lake county, Indiana (1898), gives the following bail schedule: Bailable homicides \$2,000. Assault with intent to commit felony \$1,000. All felonies where the punishment cannot exceed three years in State prison \$500. All other felonies \$500. All misdemeanors \$100. The court reserved discretionary right to vary from the schedule.



## EX PARTE DOUGLAS.

25 Nev. 425—62 Pac. Rep. 49.

Decided Aug. 30, 1900.

BAIL:\* GRAND LARCENY: *Amount of bail.*

Upon a charge of stealing eighteen head of cattle of the value of \$540, the committing magistrate fixed the bail at \$5,000. *Held*, excessive and bail fixed at \$3,000.

Petition for writ of *habeas corpus* to reduce bail of Leslie E. Douglas. Bail reduced.

*Torreyson & Summerfield*, for the petitioner.  
*W. D. Jones*, Attorney-General, for the State.

PER CURIAM. The petitioner was committed to the custody of the sheriff of Churchill County by a justice of the peace upon a preliminary examination for the crime of grand larceny. The order of commitment fixes the amount of bail in the sum of \$5,000. The complaint charges him with the larceny of eighteen head of cattle, of the value of \$30 each. He contends that the bail is excessive, and brings *habeas corpus* to obtain a reduction thereof. Under well-settled rules, and the showing made, we are of the opinion that the amount of bail fixed is excessive. The proper order will therefore be made, reducing the amount of bail required from \$5,000 to \$3,000. It is ordered that the petitioner be admitted to statutory bail in the sum of \$3,000; the bail to be approved by an officer duly authorized to take such bail.

NOTE.—A bar docket of Porter county, Indiana (1898), gives the following bail schedule: Bailable homicides \$2,000. Rape, arson, robbery, burglary \$1,000. All felonies where the punishment cannot exceed three years in the State prison \$300. All other felonies \$500. All misdemeanors \$100. The court reserved discretionary right to vary from the schedule.

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## STATE v. DAVIS.

125 N. C. 612—34 S. E. Rep. 198—37 Chi. Legal News, 136.

Decided Oct. 31, 1899.

CONFESSIONS: \* *Test as to competency—Officers' duties.*

1. It is no part of an officer's duty to provoke a prisoner to make a statement.
2. A confession made under influence of hope or fear does not furnish a test as to the proof of the matter.
3. "The genius of our free institutions provides that admissions of a party should not be used against him unless made voluntarily."
4. "A confession obtained by the slightest emotion of hope or fear ought to be rejected."
5. Information given by an officer to an ignorant man under arrest, that the case was worked up, and that "he had as well tell all about it," is calculated to agitate the mind, and cause the prisoner to believe that a prompt admission, whether true or false, would mitigate his punishment.

Appeal from the Superior Court of Wake County; Hon. Moore, Judge.

Henry Davis being convicted of receiving stolen property, appeals. Reversed.

*E. A. Johnson*, for the appellant.

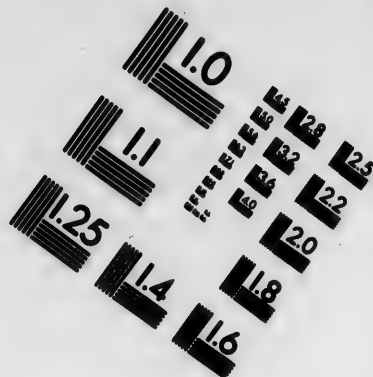
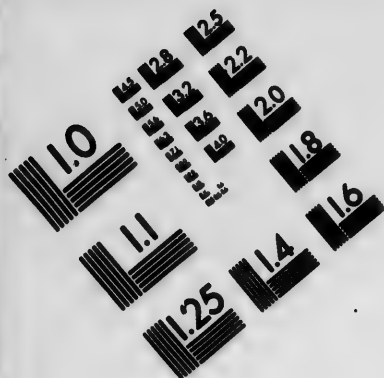
*Attorney-General*, for the State.

FAIRCLOTH, C. J. The defendant was indicted for larceny and receiving stolen goods of one Horton. It was proved that Horton's store had been robbed and burned. There was no evidence identifying the goods alleged to have been stolen, and the prosecution failed on the first count. There was no evidence relied on by the State, except the declarations of the defendant, to sustain the second count. The competency of these declarations is the only question presented.

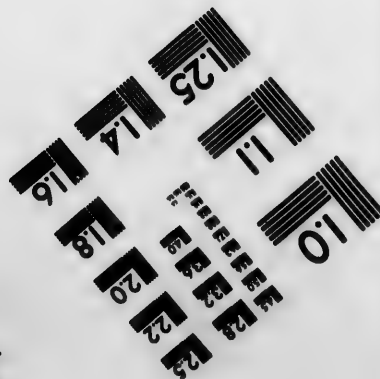
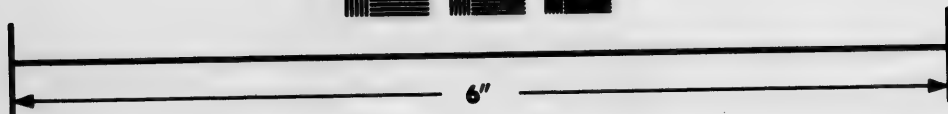
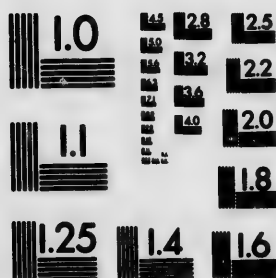
The defendant was arrested by J. H. Conrad, and while in his custody Conrad said to him that he "had worked up the case, and he had as well tell all about it." The defendant denied any knowledge of the alleged stolen articles, but after a while said that another person brought the goods to his house. The house

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\*See CONFESSION in Table of Topics.



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referred to was his mother's house. An officer, with authority to arrest, discharges his duty by simply making the arrest, and it is no part of his duties to provoke a prisoner to make any statement. The genius of our free institutions provides that admissions of a party should not be used against him, unless made voluntarily. The common-law looks with jealousy on such confessions; for, if made under the influence of hope or fear, they furnish no test of the truth of the matter. They may be true, and they may be inspired by either hope or fear that such statements will be better for him in the near future. "The mind, under the pressure of calamity, is prone to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail; and therefore a confession obtained by the slightest emotion of hope or fear ought to be rejected." *State v. Roberts*, 12 N. C. 259. The language that "I had worked up the case, and he had as well tell all about it," was well calculated to agitate the mind of the defendant, an ignorant man, then a prisoner, and cause him to conclude that a prompt admission, true or false, would mitigate his punishment. This case closely resembles *State v. Whitfield*, 70 N. C. 356, where the language of the prosecutor was: "I believe you are guilty. If you are, you had better say so; if you are not, you had better say that." Held, that the confession was made under the influence of hope or fear, or both, and was inadmissible. In 1 Greenl. Ev. tit. "Confessions," the general question is analyzed, with cited cases, and the principles above stated run through the chapter. That author says: "It should be recollected that the mind of the prisoner himself is oppressed by the calamity of his situation, and that he is often influenced by motives of hope or fear to make an untrue confession." The fact that the defendant at first denied, and after a while confessed, shows that some influence was operating on his mind. Both statements could not be true. We are of opinion that the confession, under the circumstances, was inadmissible.

#### Error.

NOTES ON THE LAW REGARDING CONFESSIONS (by J. F. G.).—Upon the general subject of confessions, see NOTES ON THE LAW REGARDING CONFESSIONS in 11 Am. Crim. Rep., pp. 283-295 inclusive; and cases on Con-

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14 Century Digest, columns 1833-1927.

American Digests, semi-annual editions, title Criminal Law, X, K. 12 Cyc., pp. 459-485 inclusive.

6 Am. & Eng. Ency. Law (2d ed.), pages 520 to 586, inclusive.

Joy on Confessions.

(This work originally appeared in Dublin in 1842; and the next year was published in America as a part of 40 Law Library. It is an excellent treatise upon the subject.)

Wigmore on Evidence, sections 815 to 867 inclusive.

Elliott on Evidence, sections 271 to 296, inclusive.

1 Greenleaf on Evidence, sections 213 to 235, inclusive.

Also Standard Works upon Criminal Law and Evidence.

*Remarkable cases—Confessions where no crime was committed—Doubtful confessions.*—For such cases see closing part of these notes entitled "*The Weight of Confessions*;" also notes following *White v. State*, and notes following *Bines v. State*, in present volume.

*State v. Davis* is a fitting introduction to this group of cases on confessions. With admirable brevity and clearness Judge Faircloth states the theory on which involuntary confessions are rejected. The accepted reason for the rejections of such a confession is that it does not constitute reliable proof of the supposed facts stated by it. Judicial experience has demonstrated that truth is not the serf of either force or fear, nor the child of struggling hope; but that when these are active factors, operating upon an agitated mind, falsehood, with proffered aid, is ever knocking at the door.

"*The ground on which confessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent, is not because of any wrong done to the accused, in using them; but because he may be induced by pressure of hope or fear to admit facts unfavorable to him, without regard to their truth in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted.*" This quotation is from the opinion of Chief Justice Shaw, in *Commonwealth v. Morey*, 1 Gray, 461. The reasoning accords with that of many other eminent jurists and law writers:

In his Commentaries (Book IV, page 357) Blackstone in speaking of confessions says: "And, indeed, even in cases of felony at the common law they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence."

Sir Michael Foster, another very eminent writer on criminal law, said: "For hasty confessions, made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported, whether through ignorance, inattention, or malice, it mattereth not to the de-

fendant, he is equally affected in either case; and they are extremely liable to misconception. And, withall, this evidence is not, in the ordinary course of things, to be disproved by that sort of negative evidence, by which the proof of plain facts may be and often is confronted." Foster's Crown Law, 243.

Mr. Russell says: "But a confession in order to be admissible, must be free and voluntary. That is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence, because under such circumstance the party may have been influenced to say what is not true and the supposed confession cannot safely be acted upon." 3 Russell on Crimes, Book V, ch. 4, sec. 1.

Mr. Joy says: "The object with which the law admits a confession in any case in evidence is to obtain truth. The only ground on which a confession is rejected is that the circumstances under which it was obtained have a tendency to falsehood; and therefore the object with which it is admitted, instead of being secured, is likely to be frustrated. If any hope or fear acts upon the mind of the prisoner, and induces him to make an untrue confession, such confession is more likely to defeat than to secure the ends of justice." Joy on Confessions, 51.

Practically the same doctrine is announced by Mr. Wigmore in section 822 of his work on Evidence just published. He not only cites but quotes from several late authorities sustaining the above proposition.

These authorities, with many others, should effectually refute a fallacious theory, by which it is occasionally contended that the ancient rule was based upon tenderness for the accused because of his unfortunate condition, being deprived of the right of counsel and not permitted to testify in his own behalf, and that the rule should now be relaxed. The same rule exists now, as did then, that is: Was the confession made under such circumstances that it is competent and reliable proof of the facts stated in it?

*Confessions obtained by threats or suggestions of favor are not admissible.*—See notes and cases cited, 11 Am. Crim. Rep. 289; also *Regina v. Rose*, 18 Cox Crim. Cases, 718, 11 Am. Crim. Rep. 275; *Rex v. Jones*, Russ. & Ryan Crown Cases, 152, 11 Am. Crim. Rep. 278; *Rex v. Upchurch*, 1 Moody Crown Cases, 465, 11 Am. Crim. Rep. 279; *Sullivan v. State*, 66 Ark. 506, 51 S. W. Rep. 828, 11 Am. Crim. Rep. 280. Also the following cases in the present volume: *Ammons v. State*, p. 82; *Green v. State*, p. 149; *Mackmasters v. State*, p. 119; *McNish v. State*, p. 125; *McVeigh v. State*, p. 143; *People v. Gonzales*, p. 97; *State v. Alexander*, p. 102; *State v. Force*, p. 160; *State v. Jay*, p. 93; *State v. Parker*, p. 137; *White v. State*, p. 86; *Whitley v. State*, p. 122; *Whitney v. Commonwealth*, p. 170; *Williams v. State*, p. 110, and *West v. United States*, p. 89.

*Involuntary confessions; an illustrative case.*—The case of *State v. Nagel* (R. I.), 54 Atl. Rep. 1063, decided April 15, 1903, is not used as a principal case in this volume, because of its length, and the fact that considerable of it is foreign to this subject. We here give the opinion, omitting the foreign matter:

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## STATE v. NAGEL.

TILLINGHAST, J.—The defendant, who has been convicted of the crime of murder, now petitions for a new trial on various grounds, amongst which are certain alleged erroneous rulings of the trial court in the admission of testimony.

The defendant's husband, James Nagel, came to his death on the 14th day of November, 1901, at about 5 o'clock in the morning, from the effect of a pistol shot which was fired into his head while he was in bed, or on the bed, in his own house in East Providence. Shortly after the fatal shot was fired, the defendant called in some of her neighbors, and told them that her husband had shot himself, which statement was then accepted by them, as it also was by the medical examiner, who appeared a few moments later, as being true. The day following, however, in view of certain circumstantial evidence which had been discovered in relation to the taking off of the deceased, and particularly in relation to the alleged purchase by the defendant, a short time before, of a pistol at the store of Halliday Bros. in East Providence, she was arrested upon a criminal complaint charging her with the murder of her husband. Upon being arraigned in the District Court of the Seventh Judicial District she pleaded not guilty to said charge, and was ordered committed to jail to await a preliminary examination in said court. She was committed to jail by Samuel S. Barney, town sergeant and mittimus officer of the town of East Providence, and while on the way to jail in his custody certain statements or admissions were made by her, according to his testimony, to which he was allowed to testify against the defendant's objection in the trial of the indictment now before us. Before testifying to such statements or admissions, the witness was inquired of by the attorney general as to whether any inducement was offered to defendant to talk about the affair; also whether the witness tried to get her to talk with him about it, or whether he made any threat to her in the premises. His answer was that he had no inducement to hold out to her, and actually held out none; whereupon he was permitted, against the defendant's objection to testify to the conversation which took place between them. He testified as follows: "She insisted on her innocence. She said: 'They have found me guilty, and bound me over to the grand jury—guilty of killing Jimmy. I am innocent. I did not kill him.' I said to her: 'You have an undoubted right to plead guilty or not guilty. That is your privilege. There is no reason why you should plead guilty. You have that privilege. The court allows you that either way.' There was nothing further said about the matter of killing directly. She said something about the pistol. She says: 'I didn't buy a pistol. In fact,' she says, 'I was never in Halliday's store in my life.' I reminded her that nothing had been said about Halliday's store; that I hadn't mentioned it. She talked rather incoherently about some other matters, and I asked her a question. I said, 'What did you pay for the pistol?' She said '\$2.' She didn't say where she bought it directly. 'Well,' I said, 'did you pay for the cartridges?' She said: 'They gave me the cartridges in the store.' Q. Was there anything said in that conversa-



tion about insurance on James Nagel's life? A. There was. She said that she had two insurance policies, if I remember correctly, \$200 each, or something to that effect. 'If I am proven and found guilty I shall lose that; I would not get a cent of it.'" In cross-examination the court said to defendant's counsel: "You can ascertain now about those threats and the inducements held out." The witness then stated that he told defendant that the truth, whatever that might be, ought to be told, but that she had an undoubted right to plead guilty or not guilty in regard to any part of the case which was coming before the court; that he also told her: "The truth is always the best, except where it would be a means of conviction; and even then I should prefer, if it was my case, to tell the truth. Q. And you told her that before she said these things? A. Yes, sir; I told her so always."

In view of these admissions on the part of the witness Barney, the defendant's counsel then requested that the jury be instructed not to consider said testimony, on the ground that witness had no right to give her advice at all, or hold out any inducements. This request was denied, and the defendant duly excepted thereto. In further cross-examination witness testified that he said to defendant: "'It is thought that you bought this revolver,' but she said, 'No, sir; I did not buy it.' I said to her: 'There is no question but what you bought the revolver, and if you did you will gain nothing by denying it.' Also: 'It would be better for you to tell the truth. We have ample proof that you purchased this revolver.' That she said: 'I did not, and I never was in Halliday's store in my life.' I remarked that I did not mention Halliday's store in the matter at all. 'Now,' I said, 'having mentioned the place where you bought it, you might just as well say whether or not you bought it. What did you pay them for that revolver?' She said 'I paid them \$2 for it, and they gave me the cartridges.'" Defendant then told witness where she had put the revolver, but she persistently denied ever having used it upon her husband.

The question raised by the defendant's exception, broadly considered, is whether the court erred in not granting defendant's request to instruct the jury not to consider any part of said Barney's testimony which related to statements or admissions made by defendant concerning the purchase of the pistol and the procuring of the cartridges therefor. Although the statements or admissions in question did not amount to a confession within the strict legal import of that term—a confession being a voluntary acknowledgment of guilt, or, as well and concisely defined in Stephen's Digest of the Law of Evidence, p. 52: "A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime"—yet, as said admissions had a vital bearing upon a highly important link in the chain of circumstantial evidence relied on by the prosecution, we must regard them as in the nature of a confession. Indeed, we think it is manifest from the record that the sole ground upon which the proof of the conversation above set out was tendered by the prosecution was that it was in the nature of a confession. And, this being so, it follows that in determining whether the proper foundation for its admission was laid, or, rather, whether the trial court

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erred in not ruling it out, as requested by defendant, it is immaterial how far the confession tended to prove guilt. "Having been offered as a confession," as said by the court in the recent and noted case of *Bram v. United States*, 168 U. S. 541, 18 Sup. Ct. 183, 42 L. Ed. 568 (10 Am. Crim. Rep. 547), "and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in determining its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot, on the one hand, offer evidence to prove guilt, and which, by the very offer, is vouched for as tending to that end, and, on the other hand, for the purpose of avoiding the consequences of the error caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial, because it did not tend to prove guilt." This quotation is pertinent to the case at bar. The admissions made by the defendant were offered by the prosecution as tending to prove guilt. If they did not have that tendency, then they were inadmissible in evidence. But that they clearly did tend to prove guilt, and that they were only admissible as being in the nature of a confession, or as amounting to a partial confession, is evident.

Treating the statements of the defendant in question, then, as in the nature of a confession, we are next to inquire whether, in view of the manner in which they were obtained by the committing officer, they were obnoxious to the rule which obtains in such cases. This rule is well stated in 3 Russell on Crimes (6th ed.), 478, as follows: "But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence; not obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. . . . A confession can never be received in evidence where the prisoner has been influenced by any threat or promise, for the law cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." See, also, 1 Greenl. Ev. (16th ed.), §§ 219, 220; Taylor on Ev. (9th ed.), § 872 *et seq.*; 1 Bishop, Crim. Pro. (3d ed.), § 1217 *et seq.*; *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; *Reg. v. Baldry*, 2 Den. & P. Crown Cases, 428.

We have come to the conclusion, after much consideration, that the statements or admissions made by the defendant were not freely and voluntarily made within the rule as thus stated, and hence were improperly allowed to go to the jury. It appears, from the cross-examination of the committing officer, Barney, that, previous to the making of most of said statements by the defendant, he had told her that the truth, whatever that might be, ought to be told; that it was always the best, except where it would be the means of conviction; and that even then he should prefer it if it were his case. He had also told her, during the latter part of the conversation, that it was thought she bought the revolver; that there was ample proof that she bought it; and that, having mentioned the place where she bought it, she might just as well say whether or not she bought it. At the time when the

statements in question were obtained from the defendant she was in the custody of this officer, and on the way to jail, charged with the crime of murder. That she must have been in a high state of nervous excitement and mental distress, whether guilty or not guilty, and hence ready to catch at any gleam of hope whereby her situation might be bettered, goes without saying. The familiar saying that "drowning men catch at straws" aptly illustrates the mental condition of one in her situation at that time. And we think it is not only possible, but probable, that, having stoutly and persistently asserted her innocence to the officer of the terrible crime charged against her, she was led to believe, by his persuasive and continued questioning, that it would not only do no harm, but would in some way be better for her to admit the purchase of the pistol and the obtaining of the cartridges in question. In other words, the language used by the officer, taken as a whole (and taken in connection with the contradictory statements made by the defendant about the purchase of the pistol), was such as to very naturally convey to the mind of the defendant the idea that she would gain some advantage by admitting that she bought the pistol and obtained the cartridges therefor. And hence it cannot be said that her admission relating thereto was voluntary.

We do not wish to be understood in what we have thus said, however, as deciding that a mere request, advice, or admonition to tell the truth will render a confession induced thereby inadmissible in evidence, for the strong current of authorities, as well as the better reason, is to the contrary. Am. & Eng. Ency. of L. (2d ed.), vol. 6, p. 531, and cases cited: *State v. Habib*, 18 R. I. 558, 30 Atl. Rep. 462. Those decisions which have gone to the extent of so holding have certainly gone "to the verge of good sense, at least." *Commonwealth v. Chance*, 174 Mass. 249, 54 N. E. Rep. 551, 75 Am. St. Rep. 306. But where the request or admonition is given in such language and under such circumstances that the prisoner might naturally have understood it as recommending a confession, the confession induced thereby will be inadmissible in evidence. Nor do we wish to be understood as agreeing with counsel for the defendant in his contention that a confession made by a prisoner to the officer in whose custody he is, is not admissible in evidence, for such is not the law. On the contrary, a confession to the officer in charge of a prisoner, if voluntarily made, is just as admissible as if made to any other person, as ruled by the trial court in this case. See cases collected in Am. & Eng. Ency. of L., vol. 6, *supra*, pp. 536, 539; *Pierce v. United States*, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454.

(Several pages of the opinion, not bearing upon the subject of confessions, are here omitted.)

We have carefully examined the other exceptions taken by defendant's counsel, but do not consider them to be tenable, or of sufficient importance to require special attention. As a new trial must be granted because of the error of the court in refusing to rule out the testimony first hereinbefore considered, after it appeared that the admissions in question were improperly obtained, there is no occasion for us to determine whether the verdict was against the evidence.

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*Involuntary confession—Preliminary examination—Plea of guilty entered by defendant before being warned is not a voluntary confession.—McNish v. State, present volume, p. 125.*

*Involuntary confessions—Preliminary examination—Statements made by defendant at a preliminary examination, before being advised of his rights, are not admissible as voluntary confessions.—See note to McNish v. State, in present volume, p. 127.*

*Involuntary confessions—Preliminary examination—Defendant's examination taken under oath by the magistrate is not admissible.—State v. Parker, present volume, p. 137.*

*Intoxicating liquor furnished by the officers to the prisoner. In McNutt v. State (Neb.), 94 N. W. Rep. 143, decided March 18, 1903, in its opinion the court said:*

"The State showed, by the evidence of several witnesses, admissions made by the defendant as to his connection with the burglary complained of, and it is urged that it was not sufficiently shown that no inducements were offered the defendant to procure the admissions testified to, and in this connection it is shown that immediately after the defendant's arrest, while the sheriff who arrested him was returning him to Hartington, where the crime was committed, the sheriff not only allowed the defendant to have intoxicating drinks, but himself furnished such drinks to the defendant, and afterwards questioned the defendant in regard to the offense. Such conduct on the part of the sheriff is not justifiable, and, under ordinary circumstances, the admitting in evidence of the testimony in regard to admissions so obtained would be erroneous and require a reversal of the judgment of conviction; but in this case the evidence of the defendant himself shows that this conduct of the sheriff was due rather to thoughtlessness than to any attempt on his part to procure damaging evidence against the defendant, and also shows that the defendant afterwards, of his own free will, repeated the same statements to several other parties, and made other similar statements in open court upon his preliminary examination; so that it is impossible to believe that the defendant has been prejudiced by this improper conduct of the sheriff."

*Tricks—The mere fact that a confession was obtained by means of a trick does not render it inadmissible, if no promise, threat or other improper means were used. In Commonwealth v. Cressinger, 193 Pa. St. 326, 44 Atl. Rep. 433, decided October 30, 1899, in affirming a conviction for murder, the court said:*

"The evidence of the confession made to Grim was properly admitted. The fact that it was obtained by a trick is no objection to its competency, unless the circumstances are such as to suggest an inference that, through fear or hope, a false confession may be made. There were no such circumstances in the present case, nor anything which required the judge to dwell particularly upon them in his charge. A knife was produced, and the prisoner led to believe that it was his. Under this supposition, he told where he had hidden his, and then told the story of the murder. The object of evidence is to get at the truth, and a trick which has no tendency to produce a confession, except one

in accordance with the truth, is always admissible. Society and the criminal are at war, and capture by surprise, or ambush, or masked battery, is as permissible in one case as in the other. *Commonwealth v. Goodwin*, 186 Pa. St. 218, 40 Atl. Rep. 412 (11 Am. Crim. Rep. 271; 65 Am. St. Rep. 352); *McClain v. Commonwealth*, 110 Pa. St. 263, 269, 1 Atl. Rep. 45.

*The mere fact that the defendant was under arrest at the time he made the confession, does not, of itself, render the confession involuntary.*—In *Young v. State*, 90 Md. 579, 45 Atl. Rep. 530, decided January 11, 1900, the court said:

"The second and third exceptions present a question of evidence. The sheriff, who had been sworn as a witness for the State, testified: That, having been informed of the homicide, he went to Fleming's house to look for Young, one of the defendants. That he asked for Young, who thereupon came down 'about half dressed,' and that witness said, 'Joe, you don't know what I am up here for, do you?' and he said: 'Yes, sir; I do. It's about that shooting scrape in Belair.' That he asked for his pistol, and he said he didn't have any. That witness said: 'You could not shoot a man without having a pistol.' That Mollie Fleming went into the house and got the pistol, and witness 'asked him if it was the pistol he did the shooting with, and he said it was.' That Young said he 'had shot once or twice,' etc. On cross-examination, witness said that 'Young seemed to be very much excited, and so was Bush.' During the giving of the evidence the counsel for the prisoners several times objected to the admission of Young's answers, and, after the cross-examination, excepted generally to the sheriff's testimony. The court, however, overruled all the objections, and admitted it. The fact that a party is in custody is not enough of itself to render his confessions inadmissible, provided they are not extorted by inducements or threats. *Pierce v. United States*, 160 U. S. 355, 16 Sup. Ct. 321, 40 L. Ed. 454; *Rogers v. State* (Md.), 43 Atl. Rep. 922; *Ross v. State*, 67 Md. 288, 10 Atl. Rep. 218. In this case the confession was freely and voluntarily made. No threat was made by the officer, and no hope or promise of benefit held out to him. It was 'left to the prisoner, as a matter of perfect indifference, whether he should open his mouth or not.' 'This,' said Pollock, C. B., in *Reg. v. Baldry*, 12 Eng. Law & Eq. 597, 'is the distinction between those cases where the confession is held inadmissible, and those where it is not.' In *Biscoe's Case*, 67 Md. 10, 8 Atl. Rep. 577, on which the appellants rely, there was an inducement which the court thought was of the 'strongest kind.' The confession was therefore rejected."

To the same effect, see *Stevens v. State*, 138 Ala. 71, 35 So. Rep. 122, decided June 30, 1903, and *State v. Peterson*, 110 Iowa, 647, 82 N. W. Rep. 829, decided April 11, 1900, and *Commonwealth v. Culver*, 126 Mass. 462, 3 Am. Crim. Rep. 81.

*Voluntary confession made to a prosecuting attorney.*—In *State v. Abbato*, 64 N. J. L. 658, 47 Atl. Rep. 10, decided March 23, 1900, the court said:

"Error is also assigned to the admission of the confession itself against the objection of the prisoner, the ground of objection being that

the confession said by Abbatto was made by him in the presence of the prosecutor, De Foe, and that thing with the case, the matter. In he knew abbatto was made, from the p direct or in did not ad unrary one, 62 N. J. La dence."

*Confession to a conviction.*—In its opinion, the confession is that spoken by the prisoner.

*When a confession is suggested.*—In its opinion, the confession is that spoken by the prisoner.

*In determining the voluntariness of a confession.*—In its opinion, the confession is that spoken by the prisoner.

*FELL, J.*—In its opinion, the confession is that spoken by the prisoner.

the confession was not voluntary. It appears that before anything was said by Abbatto he was informed by the interpreter, at the instance of the prosecuting attorney, that he was charged with the murder of De Foe, and that, knowing he was so charged, he need not say anything without he desired; but that, if he wanted to tell anything about the case, the prosecuting attorney would like to know the truth of the matter. In reply the prisoner expressed his willingness to tell what he knew about the case, and his examination was then taken. No threat was made, or violence used, for the purpose of extorting any statement from the prisoner, nor was it induced by a promise of any kind, either direct or implied. This being so, the so-called 'confession' (the prisoner did not admit by it that he had taken the life of De Foe) was a voluntary one, as defined by this court in the recent case of *Roesel v. State*, 62 N. J. Law, 216, 41 Atl. Rep. 408, and was properly admitted in evidence."

*Confessions made during sleep.*—In *People v. Robinson*, 19 Cal. 40, a conviction for murder was reversed upon the sole ground that utterances made by the defendant while asleep were introduced in evidence. In its opinion the court said: "If the defendant was asleep, the inference is that he was not conscious of what he was saying, and words spoken by him in that condition constitute no evidence of guilt."

When a confession is incompetent, because it was procured by promises, suggestions or threats, subsequent confessions, not remote in range of time, are presumed to result from the same promises, suggestions or threats; unless such presumption is clearly rebutted by evidence, or by the circumstances surrounding the confession.—*Barnes v. State*, 36 Tex. 356; *State v. Stimmis*, 43 La. Ann. 532, 9 So. Rep. 113, and notes in 11 Am. Crim. Rep. 290. Also see the following cases in the present volume: *Mackmasters v. State*, p. 119; *McNish v. State*, p. 125; *State v. Force*, p. 160; *Whitley v. State*, p. 122.

In determining whether the second confession was the result of threats, promises or suggestions of favor, the "age, character and situation of the prisoner, and all the circumstances under which the confession was made, are to be taken into consideration."—This was held in *Commonwealth v. Sheets*, 197 Pa. St. 69, 49 Atl. Rep. 753, decided July 11, 1900; the court also holding that the matter rests largely in the sound discretion of the presiding judge. In that case it appeared that the sheriff induced the prisoner to confess, by telling him that he would befriend him. This confession was not offered; but two confessions made the next day, one of them in the sheriff's presence, were admitted in evidence. It would seem that the presence of the sheriff would naturally operate as a renewal of the promise, and should have operated to exclude at least that confession; but the action of the presiding judge was not disturbed. The opinion, so far as it relates to this subject, is as follows:

FELL, J. Generally, where a confession of guilt has been obtained from a prisoner by undue means, it will be inferred that a confession of the same or like facts, afterwards made by him, was induced by the same influences; and evidence of a second confession will not be received unless from the length of time intervening, or from proper

warning of the consequences of confession, or from other circumstances, it appears that the influence which led to the first confession has been entirely removed. Whart. Cr. Ev., § 687; 1 Greenl. Ev., § 221. But no general rule can define the facts which in all cases should be deemed to have influenced the mind of the prisoner, as matters which would readily affect the mind of one person would have no influence upon that of another. The age, character and situation of the prisoner, and all the circumstances under which the confession was made, are to be taken into consideration, and the question whether the original influence continues to operate must be left largely to the discretion of the trial judge, who hears the testimony, sees the witnesses, and observes the conduct of the prisoner. In this case the first confession was made after the prisoner's arrest, to a detective, who asked him to make a full statement, and promised that if he would do so he would befriend him. Evidence of this confession was not offered. The confessions of which evidence was admitted were made the next day,—one to the editor of a newspaper, who knew the prisoner, and told him that he had called to get any statement which he might care to make for publication; the other to the employer of the prisoner, who had gone to see him because of a friendly interest. Neither of these persons said a word to induce the prisoner to confess, and no reference was made to his previous confession, if they knew of it. The sheriff was present when the first two confessions were made, but not at the third. On neither occasion did he speak to the prisoner, nor did the prisoner speak to him. He acted as a jailer merely in admitting the parties. These confessions were entirely voluntary, and had no connection in thought with the first confession, and we see no reason to believe that they were made under the influence of a hope of personal aid which had been excited by the detective. The evidence was therefore properly admitted.

*Preliminary inquiry*—Previous to admitting an alleged confession in evidence, there should be a preliminary inquiry as to the competency of the alleged confession, in which the burden is on the prosecution to show that it was freely and voluntarily made.—See notes on cases cited in 11 Am. Crim. Rep. 284-287, inclusive; *Regina v. Rose*, 18 Cox Crim. Cas. 717, 11 Am. Crim. Rep. 275; also the following cases in the present volume: *Commonwealth v. Antaya*, p. 135; *Green v. State*, p. 149; *People v. Miller*, p. 183; *State v. Force*, p. 160; *State v. Young*, p. 154; *contra*, *Grover v. State*, p. 128.

*Preliminary inquiry*—In the preliminary inquiry the defendant has a right, not only to cross-examine the witnesses offered to prove the confession, but may introduce rebuttal testimony.—See notes on same topic, 11 Am. Crim. Rep. 287, 288; also the following cases in the present volume: *People v. Miller*, p. 183, and *State v. Hill*, p. 191, with notes, sustaining, and *Commonwealth v. Epps*, p. 185, denying the right to introduce evidence in rebuttal.

The preliminary inquiry should be had in the absence of the jury; but when it results in the admission of the confession, the presence of the jury during the inquiry is not reversible error; for the jury may then consider such evidence in determining the weight of the confes-

sion.—So March 23,

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ston.—So held in *Kirk v. Territory*, 10 Okl. 46, 60 Pac. Rep. 797, decided March 23, 1900. In the opinion in that case the court said:

"It is next contended that the court erred in permitting the testimony taken to determine the competency of confessions to be given in the presence of the jury. It is a well-settled rule of law that the question of the competency of confessions is one for the court, and should be determined preliminarily to allowing the confession to go to the jury. The authorities are not harmonious upon the practice. We think the correct practice, and the one sustained by sound reason and weight of authority, is that when testimony is offered to prove a confession, and objection is made to the competency of the evidence, the court should withdraw the jury, and hear all the evidence offered on the objection, both for and against the competency, and decide the question in the absence of the jury. If the court holds the confessions are not proper to be shown, then no prejudice can result from such action. On the other hand, if the court holds the confessions admissible, then the jury should be recalled; and, if the defendant desires, all the evidence relating to the competency of such confessions, the circumstances under which they were given, the condition of mind of the defendant, and all other facts affecting or tending to affect the weight or credit of such confessions, should be permitted to go to the jury. In the case at bar no prejudicial error was committed by the trial court in hearing the evidence on the competency of the confessions in the presence of the jury. When the court decided that the confessions were competent to be shown, any error of hearing the matter before the jury was cured. The jury had a right to this testimony, not for the purpose of passing on the competency of the confessions, but for the purpose of determining what weight or credit they would attach to them. Had the court, after hearing the testimony on the competency of the confessions, decided that they were not proper to be shown, then error might have been predicated upon the improper evidence before the jury."

In *State v. Gruff*, 68 N. J. Law, 287, 53 Atl. Rep. 88, decided September 26, 1902, it was contended that the court below erred, not only in admitting a confession, but in hearing evidence as to its competency in the absence of the jury. Both of these contentions were overruled, the court saying:

"The next ground of complaint relates to the admission as evidence of a confession made by the defendant. The crime with which the defendant stood charged was the killing of his wife at Westmont,—an act which was at first thought to have been committed by shooting. On the day when the homicide took place the defendant was arrested by Jacob Schiller, and he talked to him on the way to the office of the public prosecutor. On arriving at that office, Schiller, in presence of the defendant, said to the assistant prosecutor: 'This man would like to make a statement about the shooting affair at Westmont.' Thereupon that official said to the defendant: 'Are you the man that has been making all this trouble?' The defendant answered: 'I am.' Then the assistant prosecutor said to him: 'I am the assistant prosecutor, and it is my business to help investigate crime. You are under arrest, and you



do not have to talk at all about it. I do not make any promise to you for making the statement, and what you say will be used against you. It must be a purely voluntary statement.' To this the defendant replied that he wanted to make a statement, and forthwith proceeded with the 'confession' that was offered in evidence. The facts above mentioned having been sworn to by witnesses in presence of the jury, the defendant's counsel still objected to the admission of the confession, on the ground that the defendant was not shown to have been aware of the charge against him. In answer to this objection, the State alleged that the confession itself would fully evince the defendant's knowledge on that point; and the trial justice, assuming that such knowledge ought to be shown, ruled that he would hear the confession in the absence of the jury, and would not permit the jury to hear it unless he was satisfied that the defendant knew at the time to what the warning given by the assistant prosecutor referred. That course being adopted, the confession afforded indubitable proof of the defendant's knowledge, and thereupon the confession was testified to before the jury. It is perfectly manifest that this procedure could work no wrong to the defendant. When the question of admitting a prisoner's confession as evidence of his guilt is pending, it is the duty of the trial judge to ascertain whether the confession was voluntarily made, without the influence of threats or promises, or perhaps of deception. *Roesel v. State*, 62 N. J. Law, 216, 41 Atl. Rep. 408; *Bullock v. State*, 65 N. J. Law, 557, 47 Atl. Rep. 62; *State v. Young* (N. J. Err. & App.), 51 Atl. Rep. 939.

"On these points there is no room for hesitation in the case before us. The rights of the defendant were carefully and completely guarded. But it is now claimed that it was wrong for the trial justice to look into the confession for the purpose of determining any question relating to its admissibility, and that it was also wrong for him to receive any testimony in the absence of the jury. As to these alleged errors, it is plain that the declarations of the defendant might afford legitimate evidence of his knowledge, as they also might respecting his willingness to speak, and his freedom from improper influences. The trial justice, therefore, having a duty to discharge which required that he should be informed touching these particulars of the defendant's mental attitude, did right in examining the defendant's declarations respecting them; and, this duty of the justice being distinct from that of the jury, it was not erroneous for him to conduct such examination out of the hearing of the jury. Usually, indeed, the testimony to be considered by the judge on the points mentioned should be taken in the presence of the jury; for it will tend not only to instruct the judge as to the admissibility of the confession, but also to enlighten the jury as to the credibility of the confession if admitted in evidence. But when, as here, the evidence tendered on the preliminary question of admissibility is such as would unfavorably affect the prisoner in the minds of the jury, and illegally if the confession were finally held to be not admissible, it certainly promotes the due administration of law for the judge alone to hear that evidence in the first instance. If he then holds the confession to be admissible, the same evidence, so far

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"It is insisted that the witness Millard's showing of the admissibility of the confession is usually a question of fact, whether the confession was made voluntarily or fear—and the witness is to be heard in making it into making it may be as to the voluntariness of the confession, and is made, the witness himself be influenced by fear. In such cases the witness is to be heard in the confession. Here the witness charged was with the defendant in the conversation at the time and place of the trial of the confession in the record. It was admitted any following a *State*, 40 Ala. 520 54 Ala. 520 17 So. Rep. Confession confessed.—In first made read over t

as it relates to the credibility of the confession, can be repeated before the jury. Such a course avoids, on one hand, the exclusion of a confession which has in fact all the essentials of legal evidence, although those essentials may not be susceptible of extrinsic proof, and, on the other hand, avoids the disclosure to the jury of inculpatory declarations of the prisoner which in fact lack some essentials of legal evidence. The conduct of the trial in this matter was unexceptionable."

*Preliminary inquiry*—When the surrounding circumstances clearly show that the confession was voluntarily made, it is not necessary to follow the usual practice of putting direct questions as to the competency of the confession.—So held in *Bush v. State*, 136 Ala. 85, 33 So. Rep. 878, decided February 28, 1903. The following paragraph is an excerpt from the opinion in that case:

"It is insisted that the court erred in admitting the testimony of the witness Miller, the insistence being that 'the proper predicate was not laid' showing that the confession was voluntary. The question of admissibility of a confession is, of course, addressed to the court, and is usually determined upon a preliminary inquiry made to ascertain whether the same was voluntary or involuntary—that is to say, whether or not it was induced or obtained under the influence of hope or fear—and the practice commonly pursued is by direct questions to the witness as to whether any promises or threats were made exciting either hope or fear, whereby the defendant was induced or coerced into making the confession. But this is not the only way in which it may be ascertained by the court as to whether the confession was voluntarily made. The attendant circumstances at the time of the alleged confession, the character of the conversation in which the confession is made, the relation of the parties to such conversation, may in themselves be sufficient to affirmatively show that there were no improper influences employed, such as were calculated to excite either hope or fear. In such a case it would be a useless formality for the court to ask the witness the ordinary preliminary questions as to whether he made the defendant any promise, or made any threats, to induce him to confess. Here the witness met the defendant the day after the offense charged was committed, at a church, when witness had the conversation with the defendant. The witness, upon examination by the court, stated the conversation 'just as it occurred.' The situation of these parties, the time and place, the nature and character of the conversation, satisfied the trial court, who had the witness and defendant both before it, that the confession was voluntary; and we are unable to discover anything in the record to lead us to the conclusion that the court below committed any error in admitting the testimony of the witness Miller. The following authorities, we think, fully sustain our conclusion: *King v. State*, 40 Ala. 314; *Washington v. State*, 53 Ala. 29; *Levison v. State*, 54 Ala. 520; *Johnson v. State*, 59 Ala. 37; *Stone v. State*, 105 Ala. 60, 17 So. Rep. 114; *Washington v. State*, 106 Ala. 59, 17 So. Rep. 546."

*Confessions in writing should be in the exact language of the accused*.—In *King v. Sexton* the confession offered in evidence had been first made orally and afterwards reduced to writing by a police officer, read over to the accused, who signed the same, saying that it was true.

In rejecting this confession, Best, J., said: "We have not the confession of the prisoner. We have only the officer's recollection of it, put into writing when the prisoner was not present, and in the language of the officer, and not in the words used by the prisoner. If a confession be not given in writing, we must be content with the recollection of the witness who proves it, because we cannot have any more certain account of it. I will receive nothing of a confession in writing that was not taken down from the mouth of the prisoner in his own words—nothing that he says that has any relation to the subject, being omitted, or anything added except explanations of provincial expressions or terms of art. The reading this paper to the prisoner, and his acknowledgment that it was correct, does not remove the objection. By the change of language, a very different complexion might be given to the story, from what it had when it came from the mouth of the prisoner, and which he might not discover when it was read over to him. The lower order of men have but few words to convey their meaning; and they know as little of expressions, that they are not in the habit of using, as if they belonged to another language. I will not receive this paper in evidence; and I hope that I shall not find a police officer again employed in preparing, either depositions of witnesses or the confessions of prisoners." This case is referred to by Mr. Joy, who says that the prosecuting attorney admitted that at a former assizes at Norwich a confession was rejected because it was not in the prisoner's own words.—Joy on Confessions, p. 20.

*Interpreter who takes a confession should be well versed in the prisoner's language.*—In *Cortez v. State*, 43 Tex. Crim. Rep. 375, 66 S. W. Rep. 453, decided January 15, 1902, in the course of the opinion the court said:

"The State offered the confessions of appellant through the witness Rogers, who stated that he was not thoroughly acquainted with the Spanish language, and could not repeat the language used by defendant, but could understand what defendant said, and correctly interpret it into English. Appellant objected to this testimony on various grounds, among others that, not thoroughly understanding the Spanish language (the language in which defendant made his statement), he was not qualified as a witness to testify as to said confession. In this contention appellant was correct. Underh. Ev., § 147, states the rule as follows: 'A witness called to prove an oral confession need not repeat the exact words of the accused, but it is absolutely essential that he should remember the substance of what was said in the conversation, and be able to state it accurately, and unless it should affirmatively appear that the witness thoroughly understood the language in which the prisoner spoke the confession should be rejected.' And to the same effect see *State v. Buster* (Nev.), 47 Pac. Rep. 194; *People v. Gelabert*, 39 Cal. 663. Now, this witness not only states that he could not repeat the language used by defendant, could not undertake to give his words, but could merely give a translation in English of what appellant had said in Spanish."

*The corpus delicti cannot be proven by a confession.*—See notes in 11 Am. Crim. Rep. on pages 292 and 293; *Bines v. State*, with notes,

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in the present volume; 1 Greenleaf on Evidence, § 217; Elliott on Evidence, § 292, and Wigmore on Evidence, §§ 2072, 2073.

*Error in admitting an incompetent confession is not cured by subsequently striking it out.*

*It is error to use an incompetent confession as a basis for cross-examination.*

*It is error to use an incompetent confession as impeaching evidence.*

*State v. Shepherd*, 88 Wis. 185, 59 N. W. Rep. 449 (opinion in full in note, 11 Am. Crim. Rep. 290), sustains all three of the above propositions; while on the third, the Texas Court of Criminal Appeals in *Walton v. State*, 41 Tex. Crim. Rep. 454, 55 S. W. Rep. 567, decided February 14, 1900, said:

"During the trial appellant became a witness on his own behalf. The State was permitted on cross-examination to ask him if he did not, at the depot in the town of Memphis, as he was going to his examining trial, and while under arrest, state to the sheriff, and in the presence of Pyle and others: ' . . . to be as easy on me as you can. I have the money, and will pay for the cattle.' To this question defendant answered that he did not make any such statement, whereupon the State was permitted to introduce Sheriff Whaat, F. L. Darnell and Theodore Pyle, each of whom testified that at the time and place above mentioned, and while defendant was in custody of the sheriff, he did say to F. L. Darnell: 'I am into it. Be as light on me as you can. I have the money, and will pay for the cattle.' It was further shown, in this connection, that the sheriff then had defendant in custody, charged with this offense; that said defendant had not been cautioned that any statement he might make would be used as evidence against him. Appellant objected to all this testimony on the ground that he was then under arrest for this charge, that he had not been warned or cautioned by the sheriff, and that the testimony thus elicited from him was in the nature of a confession. We do not deem it necessary here to enter into a discussion of the reasons why said testimony was not admissible, inasmuch as this matter was thoroughly gone into in *Morales v. State*, 36 Tex. Crim. Rep. 234, 36 S. W. Rep. 435, 846, and the reasons for our decision therein stated. And see, also, *Wright v. State*, 36 Tex. Crim. Rep. 427, 37 S. W. Rep. 732. This testimony was inadmissible either to contradict defendant,—he being the witness,—or as original testimony against him. And in this instance it was liable to be used, and doubtless was used, by the jury, both as impeaching testimony and as original testimony against appellant, and was of the most damaging character. Being inadmissible, it is unnecessary here to discuss the failure of the learned judge to limit it to the purpose of impeachment. Testimony that is illegal can be limited to no purpose in the case."

It is within the province of the jury to weigh all of the evidence submitted to it in relation to a confession.—11 Am. Crim. Rep. 298. See, also, the following cases both at large and in notes in the present volume: *State v. Baker*, p. 107; *Cook v. State*, p. 115; *Commonwealth v. Antaya*, p. 135; *People v. Miller*, p. 183; *Commonwealth v. Epps*, p. 185; *Kirk v. Territory*, p. 71, and *State v. Gruff*, p. 71.

We here give a few forms of instructions, copied from books; but do not recommend them as perfect forms, for they can be very much improved upon.

*Approved instruction.*—From Sackett on Instructions, 642:

The court instructs the jury that the confessions of a prisoner out of court are a doubtful species of evidence, and should be acted upon by the jury with great caution, and, unless they are supported by some other evidence tending to show that the prisoner committed the crime, they are rarely sufficient to warrant a conviction. (The word "never" should be substituted for "rarely." In fact they should be supported by other evidence *clearly* proving the alleged crime.—J. F. G.)

*Approved instruction.*—From Sackett on Instructions, 641:

If the jury believe from the evidence that the defendant made the confession, as alleged, and attempted to be proved in this case, the jury should treat and consider such confession precisely as they would any other testimony; and hence, if the jury believe the whole confession to be true they should act upon the whole as true. But the jury may believe part of the testimony and reject the balance if they see sufficient grounds, in the evidence, for so doing; the jury are at liberty to judge of it like other evidence, in view of all the circumstances of the case as disclosed by the evidence.

*Approved instruction.*—In *Ellis v. State*, 65 Miss. 44, the following instruction was approved:

"The jury may consider the admissions made by defendant, and will give them such weight as they may deem them entitled to under all the circumstances of the case, and if the jury believe from the evidence that the confessions of defendant were brought about by fear and were not true, they will disregard them."

*Approved instruction.*—In *Jackson v. People*, 18 Ill. 269, the following instruction was approved:

"It is the duty of the jury to treat and consider any confessions proven to have been made by the defendant precisely as any other testimony; and hence, if the jury believe the whole confession to be true, they will act upon the whole as truth. But the jury may believe that which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds in the evidence, or, in any inherent improbability in the statement itself, the jury are at liberty to judge of it like other evidence, by all the circumstances of the case."

*The weight of confession.*—The last chapter ("section") of Joy on Confessions is such a masterly review of this branch of the subject that even though, in several instances, it may seem like repeating previous parts of these notes, we close by giving it in full, as follows:

Section XIV. Weight of evidence derived from the confession of the accused.

With regard to the weight of evidence derived from the confession of a prisoner, a great difference of opinion exists.

An eminent text writer remarks: (a) that where a confession is voluntary, "it is one of the strongest proofs of guilt; for it cannot be supposed that a person really innocent would voluntarily subject himself to infamy and punishment."

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Another text writer, highly commended by Lord Mansfield, C. J., says: (b) "that magistrates cannot be too cautious in receiving confessions, as they very rarely flow from a conscientious desire to offer reparation for the injury committed, but are generally made either under an implied or express promise of favor, if not extorted by threat or through fear." Mr. Justice Foster remarks (c) when speaking of cases of high treason, "that hasty confessions made to persons having no authority to examine are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported, whether through ignorance, inattention or malice, it mattereth not to the defendant, he is equally affected in either case; and they are extremely liable to misconstruction; and, withal, this evidence is not in the ordinary course of things to be disproved by the rule of negative evidence by which the proof of plain facts may be and often is confronted."

Another writer, who had much experience in the administration of criminal law, says: "This kind of evidence I have always found, in the words of that truly learned judge, Sir Michael Foster, to be the most suspicious of all testimony." (d)

Mr. Justice Grose, in delivering the opinion of the judges in *Lambe's Case* (e) says, "that confession of guilt, made by a prisoner to any person, at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his examination before the magistrate, are, at common law, received in evidence, as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true."

A recent case (f) affords a strong instance of the caution with which jurors ought to receive parol evidence of what a prisoner is alleged to have said in the way of confession. It was proposed to give in evidence what the prisoner, who had been charged with a capital offense, had been overheard saying to his wife, as he was leaving the magistrate's room after committal. One witness stated he overheard the prisoner say to his wife, "keep yourself to yourself, and don't marry again." Another witness was called to confirm this evidence, who overheard, at the same time, what the prisoner said and stated the words to be, "keep yourself to yourself and keep your own counsel."

Alderson, B., remarked: "One of these expressions is widely different from the other. It shows how little reliance ought to be placed on such evidence."

Another judge, Mr. Justice J. Parke, has more than once observed, "that too great weight ought not to be attached to evidence of what one has been supposed to have said, as it very frequently happens, not only that the witness has misunderstood what the party has said, but that by unintentionally altering a few of the expressions really used, he gives an effect to the statement completely at variance with what the party really did say, (g)

In *Crossfield's trial* for high treason, (h) Mr. Adam, speaking of the evidence of confession, observes, "that it is very doubtful in its nature, to be taken with great consideration on all occasions, as a proof of fact or intention. If a fact is proved by an eye-witness, that fact is

proved *provably*, as distinguished from *probably*; it is proved to the full extent of legal demonstration, because if the witness speaks truth, the fact must be true. But when evidence is given of confession, observe what the nature of it is: the person who gives the testimony may speak truth, and yet the fact may not be true, because the fact does not depend merely upon the statement of another person, who has stated the thing to the witness. This doctrine makes it fit to receive with great deliberation, and even with considerable hesitation and doubt, all evidence of confession. Confessional evidence is such that the person making the declaration must not be led by hope on the one hand or fear on the other, to state circumstances that may make in his favor; and the mind which is to receive the confession, the person to whom it is made, must have an accurate, distinct understanding, capable of carrying it away with precision, and of reporting faithfully without exaggeration or misrepresentation. In all evidence of confession, the nature of it is such that it is next to impossible to convict for perjury on account of such testimony. What is the security offered by the law, that witnesses shall speak the truth in a court of justice? That they come under the terror of a penal prosecution if they do not. A witness, who comes to speak to a confession comes to give evidence to that which, from the very nature of it, cannot be negatived, because it is impossible to swear that a person did not say such or such a thing; all that can be said by a witness is negatively that he did not *hear* him say it; consequently the person who speaks to the declaration, gives his testimony without those risks of penal proceeding—he is safe from the restraints and terrors of the law."

Blackstone says of this species of evidence that, even in cases of felony, at the common law, "confessions are the weakest and most suspicious of all testimony—ever liable to be obtained by artifice, false hopes and promises of favor, or menaces; seldom remembered accurately, or reported with due precision; and incapable, in their nature, of being disproved by other negative evidence." So Foster, in speaking of prosecutions for seditious words, says, "words are transient and fleeting as the wind—they are frequently the effect of sudden transport, easily misunderstood, and often misreported."

But whatever difference of opinion exists in respect of the weight which ought to be attached to evidence derived from a confession, yet where it is admissible and satisfactorily proved, it is deemed sufficient by the English law to convict a prisoner even capitally, without the aid of any corroborative testimony of his having committed the offense with which he is charged.

In *Falkner and Bond's Case*, before the judges, R. & R. C. C. R. 481 (Easter T., 1822), there was no evidence of the *fact* of the felony except the confession of the prisoner; and the only other evidence in the case was to the effect that the prisoner had been desirous to send a message to the prosecutor to keep him away from the trial.

In *Tippet's Case* (4) there was no positive evidence that the property had been actually stolen, but there was confirmatory evidence making the theft probable. Most of the judges were of opinion that the jury might have convicted the prisoner upon his confession unconfirmed.

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In *Whelling's Case*, 1 Leach. C. C. 311, note, it is said to have been decided by Lord Kenyon, C. J., that a prisoner may be convicted upon his confession, uncorroborated by *any* other evidence.

In a modern text book (*k*), *Eldridge's Case* before the judges (*l*) is cited as establishing the same proposition. But on reference to that case it will be found that there was confirmatory evidence. The prisoner was indicted for stealing a mare, which was seen on the 9th of October with the prosecutor's servant. On the 11th of the same month it was not in the prosecutor's possession. On the 13th the prisoner took the mare to the house of the witness, saying he had been robbed of all his money, and he asked the witness for a feed of corn. The witness detained the mare for the amount of the feed and other things. The prisoner then offered to sell the mare for £35, which appeared to be a fair value, but he afterwards sold her to another for £12, and a few shillings, the expenses.

The judges met in Easter term, 1821, and were of opinion that there was sufficient evidence to *confirm* the confession.

The same discrepancy of opinion as to the weight of this species of evidence seems to exist on the American bench. In the case of the *Corporation of Columbia against Harrison*, Reports of the Constitutional Court, 2, 215, Nott, J., says, "a voluntary confession is in most cases, the highest evidence that can be given." In the case of *State v. Long*, 1 Haywood, 455, a confession is spoken of as "from the very nature of the thing, a very doubtful species of evidence."

In another American case, (*k*) the court said "the evidence of such confessions is liable to a thousand abuses. They are made by persons generally under arrest, in great agitation and distress, when each ray of hope is eagerly caught at, and frequently under the delusion, though not expressed, that the merit of a disclosure will be productive of personal safety. To disclose the confession is odious as a breach of confidence, which it is at all times. The confession is made in want of advisers, under circumstances of desertion by the world—in chains and degradation—with spirits sunk, fear predominant, hope fluttering around, purposes and views momentarily changing—a thousand plans alternating, and difficulties gathering into a multitude. How easy is it for the hearer to take one word for another, or to take a word in a sense not intended by the speaker; and, for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner and action of the one who made the confession, how almost impossible is it to make third persons understand the exact state of his mind and meaning? For these reasons such evidence is received with great distrust, and under apprehensions for the wrong it may do. Its admissibility is made to depend on its being free of the suspicion that it was obtained by any threats of severity, or promises of favor, and of any influence, even the minutest."

A modern writer remarks on this subject, (*l*) that "the imagination need not be taxed for extreme cases, in which silence, equivocation, or even falsehood, the ordinary badges of guilt, would naturally be found in company with perfect innocence. There are many instances in which the truth, properly brought to light, would set free the accused, but his very situation disqualifies him from doing justice to his own state-



ment. Conscious of his rectitude, and proud of his character, he is abashed, humiliated, and confounded by the charge. The untoward chances that have loaded him with suspicion, may go on to his utter ruin; the false witnesses, who have now established a "*prima facie*" case, may ultimately convince his judges. That he should ever become an object of accusation would have struck him yesterday as more impossible, than that accusation should now lead to conviction. The last step seems far less violent than the first, and the commencement of his process is a fatal augury, which teaches him to despair of its issue."

In the administration of the ecclesiastical law, great doubt seems to exist in regard to the force of confessions. Sir W. Scott says, (*m*) that "the court must remember, that confession is a species of evidence, which, though not inadmissible, is regarded with great distrust. There is a canon particularly pointed against them, which says, *neque partium confessioni fides habeatur*: and though it is evidence which is not absolutely excluded, but is received in conjunction with other circumstances, yet it is, on *all* occasions, to be most accurately weighed."

By the civil law, the confession of a party against himself is, in ordinary cases, considered a certain proof of the fact which he owns, unless the contrary truth is established in such a manner as that there might be reason to think that the confession is an effect of folly or stupidity in the person that confesses against himself, that which is false; but in accusations of capital crimes, it is not enough that the party which is accused confesses a crime which is not proved; but other proofs are necessary for putting him to death besides his own confession, which might be an effect of melancholy or despair, or proceed from some other cause than the force of truth. (*n*)

In a late text-book the following case is mentioned as having occurred within the personal knowledge of the writer:

Two brothers committed a highway robbery in a dark night and fled. A younger brother, who was at home, and innocent of the offense, hearing, the next day, that one of the other two was suspected, and, apprehending pursuit, used many artifices to induce a supposition that he was himself the guilty person. He was brought before a magistrate, and in his examination, used many equivocal expressions, amounting, in substance, to a virtual confession, which, however, he refused to subscribe. He was committed for trial. On his trial he had no difficulty in proving an *alibi* on the clearest testimony, and obtaining an acquittal. The brothers, in the meantime, who had actually committed the robbery, had safely arrived in America with the plunder. (*o*)

Upon the trial of *Richard Coleman*, at the Kingston assizes, in March, 1748 or 1749, for the murder of Sarah Green, who had been brutally assaulted by three persons, and died from the injuries she received, it appeared that one of the offenders, at the time of the commission of the outrage, called another of them by the name of Coleman, from which circumstance suspicion soon attached to the prisoners. A person deposed that he met the prisoner at a public house, and asked him if he knew the woman who had been so cruelly treated, and that he answered "Yes—what of that?" The witness

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then said that he then asked him if he was not one of the parties concerned in that affair; to which he answered, according to one account, "Yes I was; and what then?" Or, as another account states, "If I was, what then?" It appeared that the prisoner was intoxicated, and that the questions were put with a view of ensnaring him; but the jury, influenced by this imprudent and blameable language, convicted him, and he was executed. The real offenders were afterwards discovered, and two of them were executed for this very offense, the third having been admitted to give evidence for the Crown, and the innocence of Coleman was rendered indubitable. (p.)

Whilst such anomalous cases ought to render courts and juries at all times extremely watchful of every fact attendant on confessions of guilt, these cases should never be invoked, or so urged as to invalidate indiscriminately all confessions put to the jury, thus repudiating those salutary distinctions, which the court, in the judicious exercise of its duty, shall be enabled to make. Such an use of these anomalies, which should be regarded as mere exceptions, and which should speak only in the voice of warning, is unprofessional and impolitic, and should be regarded as offensive to the intelligence both of the court and jury. (q)

It appears inaccurate to give to all kinds of confessions the same confidence, or to treat them alike with distrust. Like all other kinds of admissions, they admit of all shades of certainty and probability, from a solemn estoppel by matter of record to the slightest presumption arising from the most casual, suspicious or doubtful expressions. The jury are not only entitled, but bound to take into account all the circumstances under which a confession is made, and to give little weight to it, or throw it out of view altogether, according as these circumstances appear to incline less or more against the admission. (r).

*Marginal citations.* (a) Starkie on Evidence. (b) Burn's Justice, 1, 566—Chetwynd's ed. (c) Discourses, 243. (d) Chetwynd, for many years chairman of County Sessions. (e) 2 Leach, case, 236, reserved from the Surry Assizes, 1791, for the opinion of the twelve judges. (f) 6 C. & P., 541, *Simon's case*.—Oxford, Summer Circuit, 1834. (g) 6 C. & P., 542, note to the case of *Earle & Wife against Picken*. (h) 26 Howell's St. Trials, 108. (i) R. & R. C. C. R. 509. East. T. 1823. See also *White's Case*, *ibid.* 508, decided in the same term, where the evidence was almost the same. (k) Roscoe's Criminal Evidence, by Granger, ed. 1840, p. 35. (l) R. & R. C. C. R. 440. East. T. 1821. (m) *State v. Fields and Webber*, Peck's Rep. 140. The confession was admitted in evidence in this case. The prisoner, who was charged with murder, had previously offered to confess, and he was subsequently advised to do so. (n) Edinburgh Review, vol. 40, page 188, (March, 1824). (m) 1 Hagg. 304; *Williams v. Williams*. (n) Domat's Civil Law, book 4, 658. (o) Dickinson's Justice of Peace, 1, 629, in a note. (p) Remarkable Trials, 1, 162. See also Celebrated Trials, 4, 344. *The King against Jones and Welsh*. See also *Harrison's Case*, cited, 1 Leach; 2 Howell, 1049; 4 How. 817; 6 How. 647; 8 Howell, 1017. (q) Hoffman. (r) Allison, 2, 582.

## AMMONS v. STATE.

80 Miss. 592—32 So. Rep. 9—37 Chi. Legal News, 136.

Decided May 19, 1902.

CONFESSIONS: \* *Condemnation of "sweat box" methods.*

Solitary confinement for several days during hot summer weather, in a small, dark, ill-ventilated cell, with suggestions by the officer in charge, that it would be best for the prisoner to do what is right, and that it would "be better for him to tell the truth," renders a confession thereby obtained invalid, even though no promises or threats or other inducements were made.

Appeal from the Circuit Court of Warren County; Hon. George Anderson, Judge.

Ed. Ammons being convicted of burglary, appeals. Reversed.

Aside from the confession, there was no evidence against the defendant, except that about a month and a half after the crime, he sold a pistol, belonging to the proprietor of the burglarized house, to a shopkeeper.

*T. D. Marshall and T. G. Burchett*, for the appellant.  
*Monroe McClurg*, Attorney-General, for the State.

CALHOON, J. The chief of police testified that the accused made to him a "free and voluntary" statement. The circumstances under which he made it were these: There was what was what was known as a "sweat box" in the place of confinement. This was an apartment about five or six feet one way and about eight feet another. It was kept entirely dark. For fear that some stray ray of light or breath of air might enter without special invitation, the small cracks were carefully blanketed. The prisoner was allowed no communication whatever with human beings. Occasionally the officer, who had him put there, would appear, and interrogate him about the crime charged against him. To the credit of our advanced civilization and humanity it must be said that neither the thumbscrew nor the wooden boot was used to extort a confession. The

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efficacy of the sweat box was the sole reliance. This, with the hot weather of summer, and the fact that the prisoner was not provided with sole leather lungs, finally, after "several days" of obstinate denial, accomplished the purpose of eliciting a "free and voluntary" confession. The officer, to his credit, says he did not threaten his prisoner, that he held out no reward to him, and did not coerce him. Everything was "free and voluntary." He was perfectly honest and frank in his testimony, this officer was. He was intelligent, and well up in the law as applied to such cases, and nothing would have tempted him, we assume, to violate any technical requirement of a valid confession,—no threats, no hope of reward, no assurance that it would be better for the prisoner to confess. He did tell him, however, "that it would be best for him to do what was right," and that it "would be better for him to tell the truth." In fact, this was the general custom in the moral treatment of these sweat-box patients, since this officer says, "I always tell them it would be better for them to tell the truth, but never hold out any inducement to them." He says, in regard to the patient, Ammons, "I went to see this boy every day, and talked to him about the case, and told him it would be better for him to tell the truth; tell everything he knew about the case." This sweat box seems to be a permanent institution, invented and used to gently persuade all accused persons to voluntarily tell the truth. Whenever they do tell the truth,—that is, confess guilt of the crime,—they are let out of the sweat box. Speaking of this apartment, and the habit as to prisoners generally, this officer says, "We put them in there [the sweat box] when they don't tell me what I think they ought to." This is refreshing.

The confession was not competent to be received as evidence. 6 Am. & Eng. Enc. Law, p. 531, note 3; Id. p. 550, note 7; *Hamilton v. State*, 77 Miss. 675 (27 So. 606); *Simon v. State*, 37 Miss. 288. Defendant, unless demented, understood that the statement wanted was confession, and that this only meant release from the "black hole of Calcutta." Such proceedings as this record discloses cannot be too strongly denounced. They violate every principle of law, reason, humanity, and personal right. They restore the barbarity of ancient and medieval methods. They obstruct, instead of advance, the proper ascer-

tainment of truth. It is far from the duty of an officer to extort confession by punishment. On the contrary, he should warn his prisoner that every statement he may choose to make may be used against him on his trial.

Reversed and remanded.

**NOTES** (by J. F. G.) For his elegant, forcible and merited condemnation of criminal practices, long tolerated, yes, even encouraged by an occasional judicial smile, Judge Calhoun deserved the unqualified approval of the American public. He has turned a search light on the dark recesses of the dungeon and revealed its hideous and revolting character. In his own keen, logical, concise and scholarly style, sparkling with irony that tinges the serious subject with humor, he has demonstrated the inhuman methods used to extort confessions, and exposed the hypocritical evasions employed, under the sanction of an oath, to force them in evidence.

**Chicago Dungeons**—Many of the prison cells in the Chicago police stations are partly if not entirely below the level of the ground, furnished it may be with a plank to serve as both chair and bed. It is customary to confine prisoners in these cells for several days, without being permitted to confer with friends or have a hearing before a magistrate; and this in defiance of both the common law and the statutory requirements that a prisoner must be taken before a magistrate with the least practical delay (2 Hale's Pleas of the Crown, 119; Illinois Criminal Code, Div. 6, Sec. 7; 11 Am. Crim. Rep. 283).

The cells at the Central station are in the dingy cellar of the City Hall. It is there that prisoners suspected with more serious crime are kept in solitary confinement at the arbitrary will of the police. During such an imprisonment, it is of frequent occurrence that interviews appear in the daily newspapers, in which police officers freely speak of the methods and tricks being used upon the prisoner; and predict that under such a pressure the victim will "break down" and confess; yet if a confession is obtained and a trial had, the officers invariably, under the sanction of an oath, declare that no suggestions, promises, or threats were employed to secure the confession. (See notes 11 Am. Crim. Rep. 284.)

**Cook County Jail**.—These criticisms have no application to the Cook County jail which for eleven years has been under the control of Mr. John L. Whitman, the present jailor. Previous jailors kept three dark dungeons, with solid doors, where refractory prisoners were placed, as a method of preserving prison discipline. Mr. Whitman, by his kind treatment of the prisoners, and by granting to them as much freedom as he considers is consistent with prison life, has won their esteem and confidence, and has established a system of moral discipline, that has rendered these dungeons of the old jail tenetless relics of the past. The new jail building was constructed and fitted largely on his plan and recommendation. Its sanitary arrangements are of a superior order.

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*Hamilton v. State.*—The case of *Hamilton v. State* (77 Miss. 675, 27 So. Rep. 608), referred to in the above opinion, was decided April 9, 1900. In that case the defendant confessed in the presence of Mr. Rutland, his employer, and Mr. Thaggard, the city jailor. No direct threat or promise was made previous to the confession. On motion for new trial it was shown by Mr. Rutland's affidavit, that the defendant, who had been in his employ for about two years, was a dull negro boy, easily influenced by any one, and especially by what was said to him by his employer; and that after the arrest, Mr. Rutland went to the city prison, and upon the defendant denying guilt, told him that it would be better for him to tell all about it; that if he did not it would be worse for him; that if he would go before the grand jury and confess, he would get a lighter sentence; that the co-defendants would confess; and that he would be convicted anyway. The defendant was sentenced to fifteen years' imprisonment for burglary. The Supreme Court reversed the conviction; the opinion in full being as follows:

WHITFIELD, C. J. Rutland told the appellant, a negro boy, in the presence of Thaggard, the officer, while the appellant was in a cell in the city jail, that it would be better to tell the truth about it, if he had anything to do with it; that it would be best for him. Thaggard, asked what caused appellant to confess, said: "I suppose it was Mr. Rutland's talk. Mr. Rutland, I suppose, was the cause of it." Rutland was the employer of the appellant, and had such authority and influence over appellant as these relations would usually imply. Neither Thaggard nor Rutland gave appellant any warning, or any information that his confession should be voluntary. In *Jones v. State*, 58 Miss. 354, George, J., draws the distinction between confessions made to one in authority on inducements held out and to a private person "without any kind of authority," holding confessions competent in the latter case, in the former not; but adds that inducements held out by a private person may have the effect to induce a false confession, owing to the position of the person holding out the inducements, or the weakness of the prisoner. In that case the confession was made to Watson, a private person, having no authority over the prisoner, not his employer, in the presence of the sheriff. Watson told the prisoner it would "be best for him to tell the whole truth," and urged him to do so. But the sheriff twice warned the prisoner that he "need expect nothing from him if he did tell what he knew; that it must be voluntary on his part; that he would make him no promise, and he must expect no favor because of any confession he might make;" and the court, referring to these warnings, said: "This evidence excludes the supposition that the prisoner thought that the officer concurred in the inducements, or gave his sanction to them;" and adds: "The admissibility of the confession in this case, therefore, must be tried by the same rule as if the inducements to confess were held out by a mere private person, not having or assuming to have any power over the prosecution." And it must be added that it was shown in that case (page 352) that the prisoner "wanted to make a statement to the sheriff." Here the case is very different. Rutland

was the employer in whose service this boy had been for two years, and who naturally exercised over him the influence usual in such cases. The appellant received no warning of any kind. The statement was caused by Rutland's talk with him, in which he was told it would be the best for him; and all this while he was incarcerated in a cell of the city jail. The environments were distinctly different. Following the distinction marked out in the *Jones Case, supra*, we are unable to pronounce that this confession was free and voluntary, beyond a reasonable doubt, and the case is too close on the proof to say that it might not have turned the doubtfully balanced scale against the appellant. Reversed and remanded.

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WHITE V. STATE.

70 Ark. 24—65 S. W. Rep. 937.

Decided Dec. 14, 1901.

CONFESSIONS: \* *Promises of favor.*

A confession by the defendant that he committed arson, made to the owner of the house burned, after promises of favor, is not admissible in evidence.

Appeal from the Circuit Court of Lincoln County.  
Stephen White being convicted of arson, appeals. Reversed.

*D. H. Rousseau*, for plaintiff in error.  
*George W. Murphy*, Attorney-General, for the State.

BATTLE, J. Stephen White was accused and convicted of arson, committed by burning a dwelling house of William McDonald in Lincoln County, in this State.

In the trial of White it was shown that the house was burned. William McDonald, the owner of the house, testified, in part, substantially as follows: "The defendant made three statements to me about the burning of the house. The first he told me that Bill Smith burned it, and told me to go to John Simon's wife, who was a fortune teller, and she would tell me all about it. At another time, he told me that a black man burned it. I said to him, 'If you will tell me, I won't bother you, I

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won't tell anyone.' He then told me that he burned it, and that, if I would let him off, he would give me twenty or twenty-five dollars. I got him with Lawrence Johnson, and tried to get him to tell it before him; but he said again that a black man burnt it."

The defendant thereupon moved the court to exclude the confession from the evidence, and the court overruled his motion. In this the court erred; the evidence was inadmissible. The confession was made under the promise of the prosecuting witness, the owner of the house, that he would not be exposed or troubled by him (the witness) if he confessed. *Sullivan v. State*, 66 Ark. 506, 51 S. W. 828, 11 Am. Crim. Rep. 280.

As the evidence, without the confession, did not clearly show that the accused was guilty of the offense charged against him, the error committed was prejudicial and the judgment of the trial court should be set aside; and it is so ordered.

NOTES, WITH A REVIEW OF SEVERAL REMARKABLE CASES OF FALSE CONFESSIONS (by J. F. G.)—The accused in *White v. State*, evidently had but little regard for the truth, and was ready to frame his statements to accord with his shifting ideas of interest. To escape punishment, he accuses others at random; and then placing faith in the pledge of secrecy and promise of favor, admits guilt; but reiterates one of his former statements as soon as he discovers that the seal of secrecy is broken. Apparently there was no incentive nor desire to disclose the truth. He was evidently exercising his entire force of shrewdness in an attempt to succeed by deception, and may have believed that his offer of compensation would offset his confession and insure both immunity and silence. The confession does not bear the impress of truth and should not have been admitted in evidence.

On pages 289 and 290 of 11 American Criminal Reports, two cases are noted where confessions were proven to have been false; one being the case of *Brown v. People*, 91 Ill. 506, and the other, one mentioned by Roscoe, which will hereafter appear as the "*Case of the Perrys*," in the notes following *Bines v. State* in the present volume. Several notable instances of false confessions are mentioned by Mr. Joy, which will be found in the closing part of our notes, following *State v. Davis* in the present volume. Other cases demonstrating the necessity of proving the *corpus delicti* before a confession is received in evidence will be found in our notes following *Bines v. State* in the present volume.

The following cases are specially applicable at this place:

*The murder of James Begbie*.—In 1 American Criminal Law, 6th Ed., Sec. 684, Mr. Wharton gives the following, as a quotation from the *Memoirs of Lord Cockburn*:



"On the 13th of November, 1806, a murder was committed in Edinburgh, which made a greater impression than any committed in our day, except the systematic murders of Burke. James Begbie, porter to the English Linen Company's Bank, was going down the close in which the bank then was, on the south side of the Canongate, carrying a parcel of bank-notes of the value of four or five thousand pounds, when he was struck dead by a single stab, given by a single person who had gone into the close after him, and who carried off the parcel. This was done in the heart of the city, about five in the evening, and within a few yards of a military sentinel, who was always on guard there, though not exactly at this spot, at the moment possibly not in view of it. Yet the murderer was never heard of. The soldier saw and heard nothing. All that was observed was by some boys who were playing at handball in the close; and all that they saw was that two men entered the close as if together, the one behind the other, and that the front man fell, and lay still; and they, ascribing this to his being drunk, let him lie, and played on. It was only on the entrance of another person that he was found to be dead, with a knife in his heart, and a piece of paper, through which it had been thrust, interposed between the murderer's hand and the blood. The skill, boldness and success of the deed produced deep and universal horror. People trembled at the possibility of such a murderer being in the midst of them, and taking any life that he chose, but the wretch's own terror may be inferred from the fact, that in a few months the large notes, of which most of the booty was composed, were found hidden in the grounds of Bellevue. Some persons were suspected, but none on any satisfactory ground; and, according to a strange craze or ambition not unusual in such cases, several charged themselves with the crime, who, to an absolute certainty, had nothing to do with it."

*Old Tod's Case.*—In Sec. 683 of the same volume Mr. Wharton gives the following as a quotation from Bunyan:

"Since you are entered upon stories, I will also tell you one, the which, though I heard it not with my own ears, yet my author I dare believe: It is concerning one old *Tod*, that was hanged about twenty years ago, or more, at *Hartford*, for being a thief. The story is this: At a Summer Assize holden at *Hartford*, while the judge was sitting upon the bench, comes this old *Tod* into the court, clothed in a green suit, with his leathern girdle in his hand, his bosom open, and all in a dung sweat as if he had run for his life; and being come in, he spake aloud as follows: *My Lord*, said he, *here is the veryest rogue that breathes upon the face of the earth; I have been a thief from a child; when I was but a little one, I gave myself to rob orchards, and to do other such like wicked things, and I have continued a thief ever since. My Lord, there has not been a robbery committed this many years, within so many miles of this place, but I have either been at it or privy to it. The judge thought the fellow was mad; but after some conference with some of the justices, they agreed to indict him, and so they did, of several felonious actions; to all which he heartily confessed guilty, and so was hanged with his wife at the same."*

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*Hubert's Case.*—This case is referred to by Mr. Wigmore (see page 866), Mr. Wharton and Mr. Wills. The following paragraph is an excerpt from Wills on Circumstantial Evidence, 81:

Lord Clarendon gives a circumstantial account of the confession of a Frenchman named Hubert, after the fire of London, that he had set the first house on fire, and had been hired in Paris a year before to do it. "Though," says he, "the Lord Chief Justice told the King that 'all his discourse was so disjointed he did not believe him guilty,' yet upon his own confession the jury found him guilty, and he was executed accordingly:" the historian adds, "though no man could imagine any reason why a man should so desperately throw away his life, which he might have saved though he had been guilty, since he was accused only on his own confession, yet neither the judges nor any present at the trial did believe him guilty, but that he was a poor distracted wretch, weary of life and chose to part with it this way."

*Other Cases.* Mr. Wills tells us of a slave who accused himself of murder to prevent his return to a cruel master; and of Felton, who, when upon examination before the Council Board, having denied that any one had instigated him to murder the Duke of Buckingham was threatened with the rack, said: "If it must be so, I know not whom I may accuse in the extremity of the torture—Bishop Laud, perhaps, or any Lord at this Board."

## WEST v. UNITED STATES.

20 App. D. C. 347.

Decided June 23, 1902.

### CONFESSIONS\*—APPEAL: *Undenied suggestions of favor—Practice.*

1. An order overruling a motion for a new trial in a criminal case is not subject to review on appeal.
2. The undenied evidence being, that a police officer said to the prisoner: "You have been telling me a pack of lies; now you had better tell the truth," which was followed by a confession by the prisoner, it was error to leave the question to the jury, as to whether or not the confession was voluntary. The confessions should have been rejected as a matter of law.
3. If there had been an issue of fact as to whether those words were used by the officer, a different question might have been presented.

Appeal by the defendant to the Court of Appeals of the District of Columbia from a judgment of the Supreme Court of the District of Columbia, upon a verdict finding him guilty of house-breaking. *Reversed.*

\*See CONFESSION in Table of Topics.

The court stated the case as follows:

The appellant, Robert West, was indicted in the Supreme Court of the District of Columbia for house-breaking, with intent to steal, and was convicted and sentenced to the penitentiary for five years. On the trial testimony was introduced by the prosecution of a confession made by him to the police officer who arrested him; and the propriety of the admission of this confession in evidence is the only question in the case. The testimony of the officer in regard to it, as stated in the record, is in the following words:

"I am a member of the Metropolitan police force. On the 16th of January, 1902, about 2:30 p. m., I was sent to the drug store at the northwest corner of Seventh and M streets, N. W., and arrested the prisoner. I took him to the station house and into the witness room, and he told me various things, which on investigation I found were not true. I took him in there again about 6 p. m., and he was all right, but would not talk much. I again brought him in about 11 p. m., and, without making any promises of favor, nor any threats, nor holding out any inducements to him, he made a confession to me." On examination, the officer testified as follows: "I said, 'You have been telling me a pack of lies; now you had better tell the truth.'"

Defendant by his counsel then objected to the admission of the alleged confession, for the reason that a confession made under such circumstances and in reply to such expression was deemed involuntary in law. Objection was overruled and an exception noted.

The officer then said the defendant confessed as follows: "I got in the house with a shoe-buttoner. I intended to steal anything I could get. I make a business of house-breaking. I have been at it for three or four years."

Sergeant Sprinkle was also called on the part of the Government and corroborated the testimony of Officer Fortenary (the officer who had made the arrest) regarding the circumstances surrounding the making of said confession, and also said: "I heard Officer Fortenary say to defendant: 'You had better tell the truth.' It was then about 11:30 p. m. The prisoner was coatless and shoeless at the time."

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The record goes on to state as follows: Defendant's counsel objected to the above testimony on the same grounds as before stated, but it was admitted over his objection and an exception to the ruling noted.

The defendant then took the stand as a witness on his own behalf and denied wholly the alleged confession as testified to by said officers.

The court in its charge to the jury, among other instructions given, instructed them to consider the relations of the parties, the conversation between the officers and defendant, and the time and place when the alleged confession took place, and it was for them to decide whether or not, under all the circumstances surrounding its making, it was a voluntary confession. If they considered it as involuntary, then they should disregard it; but if they found that it was made voluntarily, then it should be taken into consideration when they rendered their verdict.

Exception was taken to the above instruction on the ground that it was a matter for the court to decide whether said confession was voluntary or involuntary.

After the verdict a motion for a new trial was filed on the ground of alleged misconduct on the part of one of the jurymen; but the motion was overruled.

Appeal from the judgment was thereupon taken to this court.

*James S. McDonogh, James A. Toomey, and Harry A. Hegarty*, for the appellant.

*Ashley M. Gould*, United States Attorney for the District of Columbia, and *Jesse C. Adkins*, Assistant, for the United States, appellee.

Justice MORRIS delivered the opinion of the court:

We have so repeatedly held in this court that the action of the trial court upon a motion for a new trial is not the subject of review here, that we must suppose that the assignment of error made in that regard in this case, was made through inadvertence. Such assignment, of course, cannot be considered.

The only question in the case is whether the alleged confession of the appellant was voluntary or involuntary in contemplation of law; and whether this should have been determined by

the court, or whether under the circumstances it was properly left to the jury for its determination.

We are constrained by the authority of the Supreme Court of the United States in the case of *Bram v. United States*, 168 U. S. 532, to hold that the confession here was involuntary, and should not have been admitted in evidence. In various cases therein cited with approval and sustained by the majority of the court as stating the correct doctrine on the subject, the words used by the officers of the law to the prisoners in their custody to superinduce a confession were almost identical with those employed in this case. In *Rex v. Griffin*, Russ. & Ry. 151, they were, "It will be better for you to confess;" in *Rex v. Kingston*, 4 Car. & P. 387, "You are under suspicion and you had better tell all you know;" in *Rex v. Garner*, 1 Den. C. C. 329, "It will be better for you to speak out;" in *People v. Barrie*, 49 Cal. 342, "It will be better for you to make a full disclosure;" in *People v. Wolcott*, 51 Mich. 612, "It will be better for you to confess;" in *Commonwealth v. Myers*, 160 Mass. 530, "You had better tell the truth;" in *Vaughan v. Commonwealth*, 17 Gratt. 576, "You had as well tell all about it." Some of these words of exhortation to a confession would seem to have been innocent enough; and yet they were each and all of them held sufficient to vitiate the confessions made in pursuance of them, and to relegate such confessions to the category of confessions involuntary in law. And if these words of inducement were objectionable, assuredly those of the present case are no less so. They are of the same precise tenor and effect.

In the case of *Wilson v. United States*, 162 U. S. 613, it was held that "when there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant;" and it is argued from this that it was proper here to submit the question to the jury as it was actually submitted. But there was here no conflict of testimony. It is true that the appellant, as a witness on his own behalf at the trial, denied that he had made the confession testified to by the police

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officers; and that in this regard there was contrariety of testimony. But there is no contradiction by him of the words of inducement used by the officers; and those words being such as, under the decision in the *Bram Case*, were sufficient to render the confession involuntary in law, there was nothing to be passed upon by the jury. If there had been controversy whether such words were used, the prisoner affirming and the officers denying such use, then a case might have been presented for the consideration of the jury under the ruling in the case of *Wilson v. United States*.

Under the authority of the case of *Bram v. United States*, it must be held that there was error in the admission in evidence of the alleged confession claimed to have been made by the appellant, as well as in the submission of the question to the jury whether the confession was voluntary or involuntary.

The judgment, therefore, must be reversed, and the cause remanded to the Supreme Court of the District of Columbia, with directions to set aside the verdict, and to award a new trial. And it is so ordered.

NOTE.—The case of *Bram v. U. S.*, cited in the opinion, is also in 10 Am. Crim. Rep. 547, 18 Sup. Ct. Rep. 273, 42 L. Ed. 568, and contains an extensive review of authorities.

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STATE v. JAY.

116 Iowa, 264—89 N. W. Rep. 1070.

Decided April 10, 1902.

CONFESSIONS\*—STATEMENT OF FACT—*Suggestions of favor—Witness.*

1. To render statements made by a prisoner admissible, they must be entirely free and voluntary; "that is, must not be abstracted by any sort of threats or violence, nor any direct or implied promises, however slight."
2. "It is not important to determine whether they amount to a confession of guilt, or merely declarations of fact tending to show guilt."

Appeal from the District Court of Boone County; Hon. J. R. Whitaker, Judge.

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\*See CONFESSION in Table of Topics.

The defendant convicted of larceny, appeals. Reversed.

*Ganoe & Hollingsworth*, for the appellant.

*Charles W. Mullan*, Attorney-General. and *Charles A. Van Vleck*, Assistant Attorney-General, for the State.

LADD, C. J. I. In the course of the trial, George Keenhold was called as witness, and testified that as special deputy sheriff he arrested the defendant, and, being asked what was said by the latter, was first cross-examined as to the competency of any statements made by counsel for the defendant, as follows: "Q. You told him if he would tell where she was it would go easier with him did you? A. I might have told him it would be better for him. The mare he had taken had been traded, and he wanted to tell where she was. After I asked him some statements, he said he would tell where the mare was. Q. That is, you asked him questions, as the testimony here shows, of Mr. Garner, that if he would tell this it would be easier for him? A. Perhaps I told him something like that; yes. Q. Didn't you, Mr. Keenhold, in fact, tell him that before Garner came up? A. Yes, sir; perhaps I did. Q. And, when you told him it would go easier for him if he would tell about it, then he told you before Garner came up about the horse? A. He told me; yes. He told me where he had traded the horse, and where he could probably find her." Direct examination continued: "When we were out at the well I told him I had a warrant for his arrest. He asked what for, and I told him. I asked him where the horse was. He said he wanted to do what was right, and I told him it would be much easier for him before a court or jury." Over the objection of the defendant, the witness was allowed to testify that the accused then stated that he had taken the mare alleged to have been stolen from the pasture of its owner, and exchanged her with some horse-traders on the way to Ames, and pointed out the horse in the road as one he had received, and that the mare traded would likely be found with said traders between Ames and Nevada.

It is insisted that this testimony of defendant's statements was incompetent, because they were induced by the promise or hope held out by Keenhold. It is elementary law that such

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statements must be entirely free and voluntary; that is, must not be extracted by any sort of threats or violence, nor any direct or implied promises, however slight, in order to be admissible. It is not important to determine whether they amounted to a confession of guilt, or merely a declaration of facts tending to show guilt, for, as said in *Greenleaf on Evidence*, "the law excludes not only direct confessions, but any other declaration tending to implicate a prisoner in the crime charged, even though in terms it is an accusation of another or a refusal to confess." The evidence leaves no doubt but that the officer, before anything was said by Jay, assured him that it would go easier with him if he would tell where the mare, alleged to have been stolen, was, and we have only to determine whether this was sufficient inducement to justify the exclusion of the evidence. In 3 *Russell Crimes* (6th Ed.), page 478, it is said: "The law cannot measure the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." This rule is fully recognized in *State v. Storms*, 113 Iowa, 385, and *State v. Novak*, 109 Iowa, 717. See, also, *Bram v. United States*, 168 U. S. 532 (18 Sup. Ct. Rep. 183, 42 L. Ed. 568, 10 Am. Crim. Rep. 547); *State v. Chambers*, 39 Iowa, 179. What was said by the officer flattered the hope of the defendant, and was certainly in the nature of an inducement to speak. It was equivalent to saying that it would be better for him if he would disclose the locality of the mare alleged to have been stolen. Many decisions are referred to in *Bram's Case* where statements made by the prisoner were held inadmissible because of the language set out. Thus, in *Rex v. Griffin*, Russ. & Ry. 151, telling the prisoner that it would be better for him to confess; in *Rex v. Garner*, 1 Den. C. C. 329, saying, "It will be better for you to speak out;" in *People v. Barric*, 49 Cal. 342 (1 Am. Crim. Rep. 178), saying to the accused, "It will be better for you to make a full disclosure;" in *Green v. State*, 88 Ga. 516 (15 S. E. Rep. 10, 30 Am. St. Rep. 167), saying, "Edmond, if you know anything, it may be best for you to tell it;" in *Biscoe v. State*, 67 Md. 6 (8 Atl. Rep. 571), saying, "It will be better for you to tell the truth and have no more trouble



about it;" in *State v. Drake*, 113 N. C. 624 (18 S. E. Rep. 166), saying, "If you are guilty, I would advise you to make an honest confession; it might be easier for you; it is plain against you;" in *Vaughan v. Commonwealth*, 17 Grat. 576, saying to the accused, "You had better tell all about it." See, also, cases collected in 6 Am. & Eng. Enc. Law, 530 *et seq.* Precisely, what words or conduct will constitute an inducement to make admissions is often difficult to determine. Much necessarily depends upon the surrounding circumstances, what had preceded the statement, and by whom made. Thus PARKE, B., held, in *Reg. v. Moore*, 2 Den. Crown Cas. 523, an admonition to a person suspected of a crime that "she had better speak the truth," did not vitiate a subsequent confession, because not made by one in authority, and in the course of the opinion observed that an important consideration was "whether the threat or inducement was such as to be likely to influence the prisoner," and that "if the threat or inducement was held out actually or constructively, by a person in authority, it cannot be received, however slight the threat or inducement." Here the suggestion that the condition of Jay might be alleviated was made by the officer having him in custody, immediately after the arrest. The situation was such as that it can hardly be conceived the words spoken to him could do otherwise than create in him the impression or belief that admissions of guilt would secure for him a benefit of some kind. Keenhold's testimony of statements made by defendant should have been rejected.

II. Within a few minutes, Keenhold and defendant met George Garner, sheriff of Boone County, whom Keenhold informed what Jay had said. The latter, after inquiring of Garner if he would prosecute, and being told he was not the prosecuting witness, repeated what he had said to Keenhold. It seems that Garner did not suppose Keenhold was an officer, and thought he first arrested defendant. But as he was not present he could not have known what Keenhold did by way of making the arrest. Certainly what occurred emphasized, rather than refuted, the fact that accused in what he said and did was influenced by what had previously transpired between him and Keenhold, and for this reason Garner's testimony of

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statements made to him should also have been rejected. *State v. Chambers*, 39 Iowa, 179.

III. The State suggests that because of prefixing his answers with "perhaps" it is doubtful whether Keenhold made the statements. The inference to be drawn from his testimony as a whole is that he did, and this appears to have been the view of the District Court for the issue as to whether he did was not submitted to the jury. See *State v. Chambers, supra*. As other evidence will necessarily be adduced on another trial, the remaining errors assigned will not be likely to arise again.

Reversed.

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PEOPLE v. GONZALES AND COTA.

136 Cal. 666—69 Pac. Rep. 487.

Decided June, 25, 1902.

CONFESSIONS:\* *Promise of Favor—Practice as to bill of exceptions.*

1. A confession extorted from a defendant charged with murder while imprisoned in the county jail, under the inducement of a promise of the sheriff that if he told the truth the sheriff would do whatever he could do for him, is not admissible.
2. Testimony of witnesses to a confession made by one defendant, implicating a co-defendant jointly tried with him for the same offense, is inadmissible hearsay as to the co-defendant, and notwithstanding the absence of a specific objection that the evidence was such hearsay, yet where the defendants were represented by the same counsel, and the evidence was objected to as incompetent, the co-defendant is entitled to the benefit of the exception taken to its admission.
3. Where the judge settled a bill of exceptions, after excuse made by the defendant for failure to give the required notice to the district attorney, and after allowing the district attorney ample time to propose amendments, which he did within the time given, such failure was not prejudicial to the People of the State; and the discretion of the judge in settling the bill against the objection of the district attorney will not be interfered with upon appeal.

Appeal from the judgment of the Superior Court of San Benito County and from an order of the court denying a new trial; Hon. M. T. Dooling, Judge.

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\*See CONFESSION in Table of Topics.

Juan Gonzales and Jose Cota convicted of murder, appeal. Reversed.

The facts are stated in the opinion of the court.

*H. W. Scott and T. H. Donovan*, for the appellants.

*Tirey L. Ford*, Attorney-General, *A. A. Moore, Jr.*, Deputy Attorney-General, and *John L. Hudner*, District Attorney, for the respondent.

HENSHAW, J. The defendants, jointly tried, were convicted of the murder of Antonio Ruiz, and sentence of death pronounced against them. From the judgment, and from the order of the court denying them a new trial, they prosecute their appeals.

The court admitted in evidence declarations made by the defendant Cota. Cota's statement was given under the following conditions: He had been arrested and placed in the county jail. He was there detained for a month without being permitted the advice of counsel, and without being put upon his preliminary examination. When first arrested he had made a statement to the sheriff and the district attorney, denying all knowledge of the crime. During this term of imprisonment he was visited by the sheriff once, and sometimes twice, a day, and, by the sheriff's own testimony, told that "he had better come out and tell the truth;" that the statement he had formerly made was not true; that it would be better for him to tell the truth; that he (the sheriff) believed that he was implicated in the crime,—had evidence tending to implicate him in it,—and did not believe his denial. Cota finally agreed to make a statement to the district attorney, saying: "I will have to do it later. I might as well do it now." Brought before the district attorney, where were present, besides that official, the sheriff, the jailer, the stenographic reporter, the interpreter, and others, he was asked by the district attorney if he understood that the statement which he was about to make might be used against him. He answered that he did. He further said that he was willing to take the consequences, and made the statement willingly. He was repeatedly admonished to tell the truth. Asked if any promise had been held out to him as an inducement, his answer

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was "that the only thing that had been held out to him was that the sheriff would do whatever he could for him." Asked if the sheriff had promised him anything for telling the truth, he answered, "No; he just said he would do whatever he could for me." It is not denied that this assurance or promise by the sheriff was held out to him. Upon this showing, Cota's declaration, as testified to by the sheriff and the interpreter, was admitted in evidence. Ruiz, the murdered man, kept a wayside saloon. According to the sheriff and interpreter, Cota said that, about a month before the murder of Ruiz, Gonzales, his co-defendant, had broached the subject of killing him for the purpose of getting his money. Upon the night of the homicide, Cota had been playing cards with Ruiz, when Gonzales came in. Drinks were ordered, and, while Ruiz was bending over behind the bar, Gonzales struck him over the head with a rifle and then shot him to death with the same weapon. Cota denied that he knew Gonzales was about to do the deed, but he admits that he took part with Gonzales in the occurrences which followed. They searched the house for money, and found it. They rifled the pockets of the dead man. They dragged the body into an adjoining room. They heaped blankets upon it, and saturated the blanket with coal oil and set them on fire. They went off together and hid the rifle. They divided the money, and they rode away together upon a single horse.

It scarcely needs reasoning to show that a statement extorted as was this one is not the free, voluntary statement which the law contemplates shall alone be admissible. Cota had been kept in solitary confinement, had been without the aid or advice of counsel, and had been daily importuned to speak the truth; being told that the evidence in the hands of the peace officers inculpated him, and that his denial of complicity in the crime was false. He was assured by the sheriff that if he spoke the truth the sheriff would do whatever he could for him, and was told "that he had better come out and tell the truth." That inducements and promises were thus held out, sufficient to destroy the voluntary nature of the statement, admits of no doubt; and the statement amounting to an admission or confession of guilt, was therefore clearly inadmissible. Against this, however,

the respondent and the trial court took the view that it was in no sense inculpatory of defendant Cota, but was exculpatory, and served only to bring home the guilt of the crime to the co-defendant, Gonzales. The reading of the statement forbids such a construction. That it tended to connect the defendant Cota with the crime, notwithstanding his denial that he knew before-time that it was to be committed, is too plain for comment. It bore with almost the same weight against Cota that it did against Gonzales. But when consideration is had to the appeal of Gonzales, the argument of counsel that the statement does not tend to incriminate Cota, but only Gonzales, is self-destructive. Remembering that it is not Cota who gives this testimony at the trial, but other witnesses who are testifying to what Cota has said, it amounts to charging and attempting to convict Gonzales upon the merest hearsay evidence. It is true that the judge properly instructed the jury that the declarations of one defendant could not be considered by the jury as evidence against the other. It is true, also, that a specific objection to the introduction of the evidence upon the ground that it was hearsay and prejudicial to Gonzales was not made. But the defendants were jointly tried, and were represented upon the trial by the same counsel, and the objections which were taken to the introduction of the evidence seem throughout to have been taken generally, and for the mutual advantage of both. Under the view of the court and respondent's counsel that Cota's statements were admissible in evidence, even if not freely made, because they tended to exculpate and not inculpate him, the logical result must obtain that the prosecution was offering hearsay evidence favorable to one defendant in its effort to convict the other upon inadmissible testimony. The ground of objection urged to the admission of the evidence, which ground we must conclude was urged equally for the benefit of both defendants, being a ground well taken, it would be the extreme of hardship in a capital case to deny Gonzales the benefit of this exception upon the very technical ruling that the evidence as to him was objectionable only because it was hearsay, and that this particular ground of objection was not urged in his behalf. The gravity of the case and the manifest injury worked to Gonzales by

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the admission of Cota's statement demand that this court should not be astute in finding reasons for upholding a verdict of death thus obtained.

A preliminary objection to the consideration of the bill of exceptions presented with the appeal is made by the respondent upon the ground that the two-days notice required to be given to the district attorney by sections 1171 and 1174 of the Penal Code was not in fact given. The district attorney at the time of the settlement of the proposed bill of exceptions urged his objection to the settlement of the bill upon the ground stated, and reserved his exception to the order of the court overruling his objection. The cases are numerous where this court, by mandate, has declined to interfere with the determination of the trial court for a refusal to settle the bill of exceptions by reason of the omission to give the required notice. Thus, without citing other authorities, in *People v. Sprague*, 53 Cal. 422, it is said: "Another circumstance made it the duty of the judge to refuse to consider the bills proposed by the defendant. No notice was given to the district attorney of defendant's intention to present either of the two drafts as required by section 1171 of the Penal Code." But upon the other hand, where the judge, in the exercise of his discretion, has seen fit to settle such a bill, this court, except under a showing of plain abuse and injury, will not reconsider the trial court's ruling. In this case a showing was made in excuse for the failure to give notice which was satisfactory to the trial court, and, in addition, before the actual settlement of the bill the district attorney was given ample opportunity to propose amendments thereto, and in fact did so. No injury, therefore, did result or could have resulted to the State from the failure complained of.

The judgments and orders appealed from are reversed, and the cause, as to each and both of the defendants, is remanded for a new trial.

We concur: McFARLAND, J.; TEMPLE, J.; HARRISON, J.;  
VAN DYKE, J.

## STATE V. ALEXANDER et al.

109 La. 557—33 So. Rep. 600.

Decided Jan. 19, 1903.

CONFESSIONS: \* *Inducements offered—Negative statements.*

1. Where a person in jail charged with robbery, is visited by the chief of police, a police officer, and the jailer, and is told by the chief of police, "If you have anything to tell, you had better tell it now," and in answer to his question as to whether another party, suspected of participation in the crime, has been apprehended, receives from that officer the reply, "No; (but) as soon as he is caught he is going to turn State's evidence, and if you have got anything to say, you had better say it now," the confession which he is thus induced to make is not voluntary, and should be excluded upon the objection of his counsel.
2. Where, in such a case, it is shown that the accused made a statement to the effect that he was standing some distance away, and did not participate in the crime, but received from one of the participants, who was running away, some of the money, "which he took, and went home," it is no answer to the objection to its admissibility to say that the testimony does not prove a confession.

(Syllabus by the Court.)

Appeal from the Judicial District Court, Parish of Rapides;  
Hon W. F. Blackman, Judge:

Allie Alexander, convicted of robbery, appeals. Reversed.

*John C. Blackman*, for the appellant.

*Walter Guion*, Attorney General, and *James Andrews*, District Attorney (*Lewis Guion*, of counsel), for the State.

MONROE, J. The defendant Allie Alexander, having been convicted of robbery, appeals from a sentence of imprisonment at hard labor, and presents his case to this court upon the following bill of exceptions, to wit:

"Be it known . . . that, in the above numbered and entitled cause, the accused, Allie Alexander, Charles Rogers, and Albert Payne, were indicted and had one trial for robbery; that the State offered to prove by Chief of Police H. R. Roberts and Policeman William Irving the confession of accused, Allie Alexander, made to them in the parish jail, both being present

\*See CONFESSION in Table of Topics.

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with the keeper of the jail at the time the alleged confession was made; that the chief of police, Roberts, said to the accused, Allie Alexander, that, if he had anything to tell, he had better tell it now. Roberts was then asked by Alexander if Payne was yet apprehended, as he had heard that the police were searching for Payne, to which question Roberts replied, 'No; that, as soon as he is caught, he is going to turn State's evidence, and, if you have got anything to say, you had better say it now.'

"Counsel for accused, Alexander, requested the court to permit the accused to testify as to what impression the remark made upon his mind at the time, and the court granted the request. The accused, examined in regard to the impression made, said, 'I thought that Mr. Roberts meant that if I turned State's evidence I would be liberated, for I understood that, where two or three are accused of the commission of a crime, that the one who turns State's evidence is never prosecuted, and I then told Mr. Roberts what he will testify to.' When witness Roberts was asked by the state to tell what Alexander said, counsel for defense objected on the ground that the witness held out to the defendant hopes and promises, and the confession was illegal and should be excluded. The court overruled the objection for the reasons below stated, to which ruling counsel for Alexander excepted, and presented this bill to the district attorney and judge. It was agreed that the confession testified to by police witness Wm. Irving was objected to on the same grounds and overruled for the same reasons given for witness Roberts, which reasons are: First. I do not consider that witness Roberts held out to defendant any hopes or made any promises by such statement. Second. Roberts' testimony did not prove any confession made by accused. He stated that he was standing some distance away, and did not participate in the crime, but that one of the accused parties, running away from the scene, gave him some money, which he took and went home.

"I sign this bill with the statement made above by the district attorney. I do not consider that any hope or promise was held out to the accused that, if he voluntarily made a statement, he would be benefited thereby.

"[Signed]

W. F. Blackman, Judge."



Considering the question thus presented, apart from the testimony of the accused as to the impression made upon his mind by the statement of the chief of police, we find the text-writers and the courts practically unanimous to the effect that a confession made under circumstances such as are narrated in the bill should not be admitted in evidence. Mr. Bishop says, among other things:

"An extrajudicial confession is one made out of court, whether to an official or to a nonofficial person. The doctrine, divested of its technicality, is that a defendant's confession is admissible against him if made freely and without hope of benefit to his cause; otherwise it is rejected, since its purpose may have been to secure such benefit, rather than to disclose the truth." Bishop's New Cr. Pr., vol. 1, p. 1217.

"An involuntary one, uttered to bring temporal good or avert temporal evil, even when the anticipated benefit is small, will be rejected. It matters not whether such benefit is some specific thing promised, or an undefined clemency pictured to the hope, without form and without promise, or any other appreciable advantage of a temporal nature." Id. 1224.

And we excerpt the following expressions from other authorities, viz:

"And similarly a confession is not admissible when made by a defendant who sought the sheriff to find out if a confession would not be better for him, and was encouraged by the sheriff to think that it would be. *People v. Thompson*, 84 Cal. 598, 24 Pac. 384." Rice on Ev., vol. 3, p. 494.

"To render a confession admissible, it must have been voluntary. It is not voluntary if it was caused by any inducement or threat or promise proceeding from any person in authority, and having reference to the charge against the accused; as where it is made to a policeman or jailer, or prosecuting attorney, after a promise by him to lighten the punishment, or after a statement that it will be better to confess, or holding out any other inducement with reference to the particular charge, or on his threatening to make it harder on the accused. *Reg. v. Boswell*, Car. & M. 584; *Beckham v. Allen* (Ala.), 14 South. 859; *Commonwealth v. Myers*, 160 Mass. 530, 36 N. E. 481; *Gallagher*

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v. *State* (Tex. Cr. App.), 24 S. W. 288; *Collins v. Commonwealth* (Ky.), 25 S. W. 743; *State v. Drake*, 113 N. C. 624, 18 S. E. 166." Clark's Cr. Pr. 528.

In *State v. Nelson*, 3 La. Ann. 497, it was said by this court:

"Saying to a prisoner that it would be better for him to confess, or words to that effect, has been repeatedly held to be such an inducement offered to the prisoner as will exclude his confession; and, although opposite opinions have been entertained as to the question whether a confession made to a person who has no authority over the prisoner, upon an inducement offered by that person, is receivable, yet it seems to be settled that if the inducement be offered by a master to a servant, or by any other person having authority over the prisoner, the confession will not be deemed voluntary, and will be rejected [Citing] *Greenleaf on Evidence*, 219, 220, 221, 222; *McNally on Ev.* 42, 43; *Phil. on Ev.* The confession of Nelson comes strictly within the rules which should have excluded it from evidence. It was made to his young master, who was also his overseer, to whose authority he habitually submitted, to whom he would naturally look for protection; and, upon being advised that it would be better for him to tell what he had done, the admonition, coming from such a source, was well calculated to inspire the slave with the hope of protection from the consequences of his act, if fully confessed, and his confession, made under that impression, should have been rejected. The conviction of the slave, Nelson, based upon this evidence, must be set aside."

This case has been cited with approval in *State v. Johnson*, 30 La. Ann. 882, and *State v. Auguste*, 50 La. Ann. 491, 23 South. 612. In the case last mentioned, Mr. Justice Blanchard, as the organ of this court, excerpts the following from Russell on Crimes as a correct exposition of the law applicable to the subject:

"The law . . . cannot measure the force of the influence used or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted."

And he proceeds to say, "While the admissions or confessions of a prisoner, when voluntarily and freely made, have always

ranked high in the scale of incriminating evidence, extreme caution is to be observed in determining that they are free and voluntary—a principle firmly embedded in both English and American jurisprudence.

"And the rule is comprehensive enough to exclude manifestations of compulsion, whether physical or moral, the resultant effect of which upon the mind is hope or fear, aptly described to be 'an involuntary condition of mind.'"

It was also held, as it has been held in *State v. Nelson, supra*, that the prosecution must show affirmatively that the confession was voluntary, and not made under improper influences.

The learned counsel for the prosecution in the case at bar seem to rely upon the opinion in the case of *State v. Havelin*, 6 La. Ann. 167, as holding a somewhat different doctrine from that approved in the cases cited. There is, however, nothing in the opinion referred to which would justify the conclusion that the court, three out of four of the judges of which were the same, intended deliberately to overrule the case of *State v. Nelson*, nor was it at all necessary that such action should have been taken; for whilst, in the case then before it, it appeared that Ricker, a police officer, having the defendant in custody, had told him that it might be better for him to make a statement, and that he might, if he should do so, be permitted to turn State's evidence, it also appeared that Ricker told him that the statement might be used against him, and that he (Ricker) had no power to make him any promise of freedom.

In so far, however, as there is any conflict, the views expressed in the opinion in *State v. Havelin* must yield to those in accordance with which other cases, both earlier and later, have been decided, and which are in harmony with established jurisprudence wherever the common law prevails.

Considering the remaining proposition relied on by the State, we are equally of the opinion that it cannot be sustained. If it be true that "Roberts' testimony did not prove to be any confession made by the accused," then why was it introduced? It cannot be supposed that it was offered by the State for the purpose of securing the acquittal, or for any other purpose than to secure the conviction of the accused of the crime with which he is

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charged, and of which, upon the evidence submitted to the jury, including the testimony of Roberts, he was convicted.

It may be, for ought we know to the contrary, that without that testimony there would have been no evidence that the accused was near the scene when the robbery was committed, or that he received any of the proceeds, or that he knew anything about the crime. What we do know is that the testimony was improperly admitted in evidence as proving a confession, that it might very well have tended to the conviction of the accused, and that he was convicted, and from what has been heretofore said, it results that the conviction must be set aside.

It is therefore ordered, adjudged, and decreed that the verdict and sentence appealed from be annulled and set aside, and that this case be remanded to be proceeded with according to law; the defendant to remain in custody unless released on bond.

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STATE v. BAKER.

58 S. C. 111—36 S. E. Rep. 501.

Decided June 30, 1900.

CONFESSIONS: \* *Voluntary confession—Power of jury to weigh—Reading confession to jury after close of case—Instruction—Sentence to perpetual banishment.*

1. The jury is not required to believe confessions admitted by the court as made voluntarily; but may accept part, and reject part.
2. "All safeguards thrown around confessions by the law are to insure the truth;" but when that is apparent, formal technical rules lose their force.
3. It was not error for the court to instruct the jury a voluntary confession is admitted in evidence as the truth, if the jury find it worthy of belief.
4. It was not error to permit the prosecuting attorney to read the admitted confession, for the first time to the jury, after the State had closed its case.
5. It is error to sentence one to perpetual banishment.

Appeal from the General Sessions of the Circuit Court, Newberry County; Hon. O. W. Buchanan, Judge.

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\*See CONFESSION in Table of Topics.

De Villius B. Baker, convicted of grand larceny, appeals. Reversed.

*C. L. Blease*, for the appellant.

Asst. Atty. Gen. *U. X. Gunter*, *contra*.

POPE, J. The defendant was tried and convicted of the crime of grand larceny in February, 1900, and after sentence appealed to this court. His grounds of appeal are four in number: "(1) Because the presiding judge erred in allowing the paper marked as an exhibit, and purporting to be a confession made by the defendant, Baker, at the preliminary trial held in this case, introduced and used as evidence in this case. (2) Because the presiding judge erred in allowing the solicitor to read the letter and said statement, or so-called confession, to the jury after the State had closed its case, and defendant's attorney had stated that the defense would offer no testimony, and that he did not desire to make any argument, and the solicitor stated, 'Neither do I, except to read the papers that have been introduced;' the papers not having been read when introduced, and the reading of them not having been asked for by the court or the jury. (3) Because the presiding judge erred in charging the jury: 'Well, the rule is this: Where it is done freely and fairly, without the flattery of hope or the fear of force or violence, it is admitted as evidence, as the truth, if you find it worthy of belief, against the person who utters it.' (4) Because the sentence imposed upon the defendant, Baker, is contrary to the statute law and constitution of the State."

In disposing of the question raised as to the admission of a confession of guilt by the defendant when reduced to writing, we may remark that the written confession in this case was made without solicitation, importunity, promise, or threat being used to induce the same. Confessions are admitted if made voluntarily. The jury is not required by law to believe a confession. The jury may accept a part and reject the balance. All the safeguards thrown around confessions by the law are to insure truth. Once it is ascertained that the confession is true, no great attention is paid to technical rules. For instance, it was at one time held that a person charged with crime must be

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admonished that, if he made any statement against himself, it would prejudice his case; but in *State v. Workman*, 15 S. C. 544, this court held that "no previous warning was necessary." In that case, quoting from 1 Greenl. Ev., § 299, it was said: "Neither is it necessary to the admissibility of any confession, to whomsoever it may have been made, that it should appear that the prisoner was warned that what he said would be used against him. On the contrary, if the confession was voluntary, it is sufficient, though it should appear he was not warned." The confession in question in the case at bar was fortified by a second confession in writing, against which no objection was urged. This second confession or admission was made in a letter written by the defendant, whereby, while inculcating himself, he sought to relieve from the charge of grand larceny one of his alleged companions in crime. This exception is overruled.

We overrule the second exception. Both the confession made by the defendant at his preliminary trial before J. W. Werts, Esq., as a magistrate, and also the letter written by the defendant, as it appears upon the record for appeal, were introduced as testimony. It was perfectly competent for the solicitor to read them to the jury.

The third exception relates to an alleged error of the circuit judge in expressing to the jury what was necessary to be shown in order to render a confession admissible in testimony. The judge said, in substance, that it must appear not to have been induced by promises nor extorted by force, and even then it must be believed by the jury. We see no reversible error here. The exception is overruled.

When we come to the fourth exception, we are bound to sustain it. After the prisoner was convicted of grand larceny, the circuit judge imposed the following sentence upon him: "The sentence of the court is that you, De Villius Baker, be confined in the state penitentiary, at hard labor, for the term of seven years. After you have served five years, you will be released with the understanding that you leave the State, and never set foot in it again. If you do return, after notice on you by the State and a cause shown, you will be called back to serve the full term (additional two years), so as to make seven years; other-

wise you will be discharged after service of five years." We do not recognize the circuit judge as possessing any right to impose such a sentence as is involved in the perpetual banishment of the defendant from the State set out in the sentence. But this infirmity does not extend beyond the mere sentence itself. There is no invalidity in the trial. This court held in the case of *State v. Trezevant*, 20 S. C. 364, when speaking of a defective or illegal sentence: "We do not see why it should affect the whole proceedings, and therefore render a new trial necessary. The error occurred after trial and conviction, and applied to the subsequent proceeding, to wit, the sentence only, and in reason the remedy should extend only so far as the error extended. The weight of authorities sustains this view. 1 Bish. Cr. Proc., § 1293; *McCue v. Commonwealth*, 78 Pa. St. 191, 21 Am. Rep. 7; *State v. Johnson*, 67 N. C. 59." The case of *State v. Trezevant*, *supra*, was reaffirmed in *Same v. Jefcoat*, 20 S. C. 383. We feel bound, therefore, to overrule all the other exceptions except the fourth, which last we sustain. It is the judgment of this court that the judgment of the Circuit Court, as to pronouncing sentence, be reversed, and that the case be remanded to the Circuit Court for resentence.

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WILLIAMS V. STATE.

69 Ark. 599—65 S. W. Rep. 103.

Decided Nov. 2, 1901.

CONFESSIONS: \* *Promise of favor to a weak-minded boy, and its effect on an immediate, and on a subsequent confession—Right to cross examine a witness to bring out the reason given by defendant for the crime—Indictment; name unknown.*

1. Where there is a conflict of testimony as to whether the name of the deceased was unknown to the grand jurors as alleged in the indictment, the verdict will not upon that question be disturbed.
2. It was proper to exclude a confession made by a weak-minded boy, under a promise of favor. The court should also have excluded a subsequent confession where the proof did not show the promise to have lost its force.

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\*See CONFESSION in Table of Topics.

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3. When a voluntary confession is admitted the defendant may show, by cross-examination of the witness, the reasons at the time given for the crime.

Appeal from the Circuit Court, Mississippi County; Hon. Felix G. Taylor, Judge.

Nelson Williams, convicted of murder. appeals. Reversed.

*J. T. Coston*, for the appellant.

*George W. Murphy*, Attorney General, for the State.

BUNN, C. J. This is an indictment for the murder of a girl named Williams, whose Christian or first name is alleged in the indictment to have been unknown to the grand jury which found the indictment. The defendant in the course of the trial introduced evidence tending to prove that the Christian name was in fact known to the grand jury. The testimony of grand jurymen, however, sustained the allegation of the indictment as to this, and we will not disturb the judgment on that account. Trial and verdict of guilty, and judgment accordingly, and the defendant appeals to this court, assigning several causes for reversal.

The evidence in the case, briefly stated, is as follows: The defendant, together with his father, Charles Williams, and his sister, Ora Williams, resided in a house in Mississippi county, where they were all seen late in the afternoon of the 7th October, 1900. On that night the house was burned to the ground, and in it the bodies of Charles Williams and Ora Williams, as nearly as could be identified, were found the next morning, although burned beyond recognition, so that the identity was necessarily left to be determined much by circumstances. The defendant, shown to be then a boy of about 15 years of age, and stupid and weak-minded, from thence traveled all night, and reached the residence of M. L. Sanders, in Poinsett County, about eighteen miles away. After the news of the burning had gotten abroad, the neighbors gathered at the scene, and discovered what they conceived to be, from circumstances, the remains of the bodies of Charles and Ora Williams, although both were burned beyond recognition. At once H. S. Sanders, a brother



of M. L. Sanders, but of no relationsip otherwise to the defendant, went to his brother's, in Poinsett County, to carry the news to the family. He testified as follows: "I live near Worell, in Mississippi County, Arkansas. I knew old man Charles Williams, the father of the defendant and Ora, a girl, whom the defendant is charged with killing. I knew where they lived at the time they were killed. No one lived with them except the defendant. The three lived together. The house where they lived was in Mississippi County, Arkansas. On the 8th of October last I heard that old Charles Williams and his daughter Ora were murdered and the house burned down on them the night before. The neighbors gathered around, and thought that Nelson, the defendant, had crawled off in the weeds and died. I started to Tyrona, about eighteen miles away, in Poinsett County, to notify my brother and his wife, whose wife is the sister of the defendant, of their death. When I got there I asked them, had they seen Nelson, and they said 'No.' I then told them that his father and little sister, Ora, were murdered and burned up in the house. They then called Nelson, and he came out of the next room. I arrested Nelson, and started back with him. As we went along, I said to him: 'Nelson, did you kill your father and sister?' " At this point the defendant objected to this testimony, and the court caused the jury to retire; and in their absence the witness, continuing, said: "Nelson did not answer. I said again: 'Why don't you tell me what I asked you? Did you kill your father and sister? You tell me all about it, and I will see that you get justice and don't get hurt. You might as well tell me, for you will have to tell it in court.' He then confessed." The court sustained the objection, and refused to allow the confession to go to the jury.

M. L. Sanders testified as follows: "I am the defendant's brother-in-law. I live in Poinsett County. The defendant come to my house the morning after the killing. I asked him how he got away from the old man. He said that he killed him." Defendant, on cross-examination of this witness, offered to prove what he said was his reason for killing his father, and, when the court refused to permit him to do so, excepted.

R. M. Parker testified: "I am a justice of the peace of Mis-

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Mississippi County, Arkansas, and as such held the examining trial in this case. The defendant was charged with the murder of his father, Charles Williams, and his sister, Ora Williams. I read the charge to him, and also stated to him verbally that he was charged with killing them and burning them up, and asked him if he was guilty. He replied that he was guilty. He is stupid and weak-minded. The house that was burned was in Mississippi County. I was there, and saw the remains of the bodies. They were burned beyond recognition." Defendant excepted to the ruling of the court permitting the testimony of this witness to go to the jury.

Insanity of the defendant was not pleaded in the case, but weakness of mind, to the extent that "he had just sense enough to do whatever he was told to do," was shown; and this, of course, was proper to be shown, in order to determine the character of his confession. As argued by the attorney general, and according to the theory of the State, it may well be said that whoever killed the father killed the sister of defendant, as they were killed about the same time and in the same house, which was burned down over them, and (according to State's theory), without doubt, to destroy the evidence of the crime; but the connection of the defendant with the crime can only be established certainly with the aid of his confession. The court excluded the confession made to H. S. Sanders, the person who arrested the defendant, and so held him when the confession to him was made. This was proper, for the promise to the defendant that his custodian would see that he was not hurt may well have influenced the confession of such a person as the defendant is shown to have been. Then the question is also raised that the influence of this confession was still on the defendant when he appeared in the examining court and pleaded guilty to the charge of having murdered both Charles and Ora Williams. The rule on this subject is as stated in *Love v. State*, 22 Ark. 340: "We are of the opinion that the confession made at Fayetteville ought to have been excluded from the jury, and for the reason assigned by the defendant—that the first confession was made under the influence of fear and the hope and promise of protection, and that such influence was presumed to continue

to the time of the subsequent confessions, unless shown to have been removed, and that there was no evidence tending to show the removal of such previous influence." So it was in the case at bar. The time between his confession to H. S. Sanders and his plea of guilty in the examining court was only one day, at farthest. It does not appear that he was warned of the consequences of a voluntary confession of his guilt by any one—not even by the court. There does not appear to have been even a circumstance occurring within the time from which we could say that the impression made by the promise of H. S. Sanders could have been removed in the least degree from the mind of the defendant. To the same effect is the decision in the case of *Corley v. State*, 50 Ark. 312, 7 S. W. 255, and all the authorities to which our attention has been called. The confession made in the examining court and testified to by witness Parker on the trial should not have been admitted.

It is objected also by the defendant that the court, having admitted the testimony of M. L. Sanders that the defendant confessed to him that he killed old man Charles Williams, should also have admitted the statements of defendant to witness, giving his reasons for killing the old man, and its refusal to admit this testimony was error. In this, also, we are of the opinion that the defendant's contention should be sustained. There has been much discussion among jurists as to what part of a confession should be offered in evidence by the plaintiff, and what part by the defendant, and at what stage of the trial each part should be presented; but there is no difference among them on the proposition that the whole of the confession should be admitted, at least, so much of the statement including it as is relevant. On this question Greenleaf (volume 1, 15th ed., § 218, of his work on Evidence) says: "In the proof of confessions as in the case of admissions in civil cases, the whole of what the prisoner said on the subject at the time of making the confession should be taken together. This rule is the dictate of reason as well as of humanity. The prisoner is supposed to have stated a proposition respecting his own connection with the crime; but it is not reasonable to assume that the entire proposition, with all its limitations, was contained in one sentence, or

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#### CONFESSIONS:

1. A jury, in a case of confession, may reject a confession if the view of the evidence doubt the reasonableness of the confession. (Syllabus)
2. The evidence in a case of confession, where the confession is not admitted, is not sufficient to sustain a conviction. (Syllabus)

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in any particular number of sentences, excluding all other parts of the conversation. . . .” In cases of this kind we can readily see that reasons, more or less plausible, may be assigned for the homicide. If so, whether the effect of such a reason would be to acquit the defendant entirely, or only to lessen the degree of his punishment, it matters not; and the jury should have been permitted to consider a statement of it for what it was worth.

Other questions are presented for our consideration, but the two we have discussed are sufficient for the disposal of this case.

For the errors named, the judgment is reversed, and the cause remanded for new trial.

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COOK v. STATE.

114 Ga. 523—40 S. E. Rep. 703.

Decided Feb. 3, 1902.

CONFESSIONS:\* *Jury need not believe entire confession—Corpus delicti proven.*

1. A jury, in passing upon a confession or an incriminating admission, may, if they see proper, accept a part thereof as true, and reject a part thereof as false.
2. The evidence in this case, though entirely circumstantial, was, in view of the above rule, sufficient to show beyond a reasonable doubt that the accused was guilty, and also to exclude every other reasonable hypothesis.

(Syllabus by the Court.)

Error to Superior Court, Troup County; Hon. S. W. Harris, Judge.

Jack Cook, convicted of murder, brings error. Affirmed.

*Longley & Longley*, for the plaintiff in error.

*T. A. Atkinson*, Solicitor General, and *J. M. Terrell*, Attorney General, for the State.

LUMPKIN, P. J. The brief of evidence in the present case discloses that a colored man named Joe Tankersly lived alone

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\*See CONFESSION in Table of Topics.

in a house which contained a large room and a shed room. On the night of the 1st day of February, 1901, this house was consumed by fire. In the early morning of the next day the dead body of an adult human being was found amid the ruins of the shed room. A pool of blood was discovered on the ground in front of the door of the house, and drops of blood were traced up to the very place where the door had been situated. Another colored man (Jack Cook) was indicted for, and convicted of, the murder of Tankersly. At the trial there was testimony establishing the facts above stated. It further appeared that the corpse found in the ruins of the house was much charred and scarcely recognizable, but one witness undertook to swear positively that it was the body of Tankersly. There was also evidence tending to show that the accused had a grudge against Tankersly, and had repeatedly threatened to do him injury. The coroner of the county, who on the trial was sworn as a witness for the state, testified: "I had this defendant here (Jack Cook) before the coroner's jury. He said he didn't know nothing about the killing. Said he didn't know anything. He said, 'A secret that nobody would find out but God.'" Another witness for the State (W. H. Harris) testified that while Cook was in jail he made a free and voluntary statement to the witness, which the latter took down in writing. It was as follows: "On the night that Joe was killed, I fed my mule and went in to eat my supper, and when I came out to lock my crib door I saw Joe at my stable. I made to the stable. Joe jumped the fence and ran out across my peach orchard, not towards his house, but towards Willis'. I went right straight to Joe's house. After crossing the branch, didn't follow the road, but cut off bend by going straight across the hill. I got a stick by Joe's cotton house; looked like an old axe handle. When I got to Joe's house I went to house door and pushed it, and it would not open. I stood between the kitchen and house, and waited until Joe came. I said, 'I beat you here.' He said, 'Yes; I went off, and just got back.' I said, 'Yes; you just got back from my house; you were there trying to put something in my mule feed.' Joe said I was a liar. I said, 'I saw you and knew you.' Joe said, 'You lie.' I told him I knew it was him, and he was determined to kill that

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mule. 'You and Willis had killed my cow and hogs, and I bought a mule, and now you are trying to poison it, or done done it.' I knocked him down with the stick. Hit him first across his forehead, and knocked him to his knees; then hit him again kinder across back part of his head; then kicked him several times in the hind parts. Then I left him, but when I got to his cotton house he was groaning, so I got sorry and went back. I picked him up and let him stand awhile. I just supported him, and carried him in the house, and lit the lamp, and washed the blood off of his head. There was a big gash across his forehead, and one across the back of head. I got soot and spider webs, and put it on to stop the blood. Got an old shirt, and wrapped up his head, and laid him on the bed. Got some old things and put under his head, so that it wouldn't be too low, and covered him up, and told him to be quiet till I came back, and I would go home, and get some turpentine and rags, and fix his head up good. Told him he made me do all this. I sot the lamp in a chair near the bed—near the door; then I pulled the door to, and went home. If I had went back soon, and not stayed at home so long, I could have saved Joe, and the house, too. When I got over there the house was all on fire, and I went back home. I did not sleep any that night." "Was any one with you?" "No; I did it myself." "Were you not afraid when the coroner's jury was questioning you?" "I had whisky in me—a pint." "How did the house catch fire?" "Joe must have knocked the lamp out of the chair and set it on fire." "Do you know the sassafras stob where Joe fell, and how did all that blood get on it?" "Yes; that stob was there to prop the kitchen; and when I got sorry I went back to Joe. He was trying to get up, holding to the stob and groaning." Harris further testified that, after making this statement, Cook requested him to go over to the court house and tell the truth about it.

In the argument here, counsel for the plaintiff in error insisted that the conviction was unlawful (1) because there was no positive evidence of the *corpus delicti*; and (2) because, taking the evidence as a whole, it did not exclude every reasonable hypothesis except the guilt of the accused. The circumstantial evidence tending to identify the body of the deceased as that of

Tankersly was overwhelming, and besides, as will have been noted, there was some positive testimony that the body found in the ruins of the house was Tankersly's. We therefore feel no hesitation in holding that the identity of the deceased was sufficiently established.

On the main question—was the evidence, the same being entirely circumstantial, sufficiently strong to show beyond a reasonable doubt, and to the exclusion of every other rational hypothesis, that Tankersly was murdered by Jack Cook?—we are of the opinion that it was. There were threats on the part of the accused indicating an intention to do the deceased great bodily harm. There was Cook's own free and voluntary statement to the effect that he did beat Tankersly almost to death, drawing from him a considerable quantity of blood. This statement was corroborated by the physical fact that blood was found before the house, and traced up to it. The body of the deceased was found, not under the room in which was located the bed on which Cook said he had laid Tankersly after beating him into a state of helplessness, but amid the ruins of another and distinct part of the house. It is a well-settled rule of law that, in passing upon a confession or an incriminating admission, the jury may believe a portion of the same, and reject the balance as false. Bearing this in mind, and taking into consideration all of the physical facts above recited, our conclusion is that the jury were warranted in finding that Tankersly was actually murdered; that the crime was committed by Cook; that the latter told a part of the truth as to his connection with the homicide, and in other respects made false statements concerning the same. It is a fair and reasonable inference from the testimony as a whole that the accused, after beating Tankersly until he was unconscious and unable to move about, conveyed his body into the shed room, and then burned the house for the purpose of concealing the crime; and that he did not lay Tankersly on the bed, minister to his sufferings, and then go home with a view of procuring other means of alleviating his condition.

It was strenuously argued that, as Cook was under no constraint to divulge anything about the matter, he should be given credit for telling the whole truth. This by no means follows.

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No man can tell what a guilty conscience may impel a criminal to do. Apparently, Cook was under great mental constraint to tell something about the tragedy, but in so doing the principle of self-preservation may have restrained him from truthfully relating all that occurred. The verdict necessarily embraced a finding that some of his statement was true, and other portions of it false. It was within the province of the jury to thus deal with the statement, and we are unable, after careful deliberation, to say that the conclusion they reached on the whole matter was not duly established by legal testimony, or that the trial judge abused his discretion in approving their finding.

Judgment affirmed. All the justices concurring.

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MACKMASTERS v. STATE.

82 Miss. 459—(McMasters v. State)—34 So. Rep. 156.

Decided April 27, 1903.

CONFESSIONS: \* *Promise of favor—Subsequent confession—Second trial.*

1. Promises by a deputy sheriff to use his influence in favor of a prisoner, though made in answer to questions by the prisoner, renders a confession incompetent.
2. Subsequent confessions made, while in jail, to other persons, are presumed to be the result of the previous promise, unless the contrary is shown.
3. When the defendant does not testify, incompetent confessions are not admissible even though they are not in serious conflict with his testimony at a previous trial.

Appeal from the Circuit Court, Tishomingo County; Hon. E. O. Sykes, Judge.

Sam Mackmasters, being convicted of manslaughter, appeals. Reversed.

*Candler & Sawyer*, for the appellant.

*J. N. Flowers*, Assistant Attorney General General, for the State.

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\*See CONFESSIONS in Table of Topics.



PRICE, J. Appellant was indicted for the murder of his father by the grand jury of Tishomingo County, convicted of manslaughter, and upon a former appeal to this court (33 South. 2) the case was reversed and remanded. At the January term, 1903, of the Circuit Court, he was put upon trial for manslaughter, convicted, and sentenced for a term of twenty years in the State penitentiary. The State, over defendant's objection, introduced in evidence confessions made by the defendant while in the county jail, and before his trial. The question presented by this appeal is, were the confessions free and voluntary, under the law? The same point was raised when this case was before this court on the former appeal, but upon the first trial the defendant was introduced and testified, and, in substance, his testimony seems not to have been in serious conflict with the alleged confessions; but, upon the record as now presented, the defendant was not a witness, and whether the confessions were free and voluntary now becomes one of material importance.

The appellant, his father, and his brothers were on bad terms, had carried guns and other weapons for each other. For a long while there had been serious trouble and some shooting between members of the family. Deceased was killed on Sunday night, October 27, 1901, within about 400 yards of his own residence and within about 100 yards of the appellant's residence. When suspicion began to rest on appellant, he grew uneasy, and feared a mob from his own family; and while in jail, in care of the deputy sheriff, Wallace Harvey, at every opportunity he begged to be protected from the mob. His fears seemed not to be based upon the enormity of his crime, but upon the mere fact that one should ever be compelled to take the life of his father under any circumstances. There is no substantial evidence, aside from the confessions, to connect appellant with the killing. Mr. Wallace Harvey was the deputy sheriff, and attended the prisoner in the county jail; and, among things, Mr. Harvey testified: "He was in jail, and sent for me to come down there. He wanted to see me. He sent for me a great many times. He told me if I would help him out he would tell me about this murder. I told him that I could

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not do anything for him more than I could do for him officially. He said he was afraid folks down there would mob him. I told him that he need have no fears of a mob; that I, as deputy sheriff, would protect him. He said that if I would see that he got bond, and if I would help him out, he would tell me. Ques. What hope of reward, of fear, of violence, did you hold out to him to make that statement? A. He asked me, 'Do you reckon they would hang a fellow for killing his daddy in self-defense?' And I said, 'I don't know. They would be liable to send you to the pen for five or ten years.' He then said, 'What would you do? Would you help me out if they send me there?' I said, 'Yes; I would be willing to help you out myself.' There were other confessions made subsequently, while in the jail, to one Mr. Lambert. Lambert had also talked to Harvey about the confessions. If the confession made to Harvey is not free and voluntary, then the subsequent statements to Lambert are tainted with the same inducements, and are to be attributed to the first cause moving the defendant to make the confession to Harvey, unless the evidence clearly shows otherwise. Under the decisions of this court, it is clear that the confessions were not free and voluntary, and the objections made to their introduction in evidence should have been sustained. *Peter v. State*, 4 Smedes & M. 31; *Van Buren v. State*, 24 Miss. 516; *Simon v. State*, 37 Miss. 288; *Williams v. State*, 72 Miss. 117, 16 South. 296; *Whitley v. State*, 78 Miss. 255, 28 South. 852, 53 L. R. A. 402; *Ammons v. State*, 80 Miss. 593, 32 South. 9 (12 Am. Crim. Rep. 82; *Ellis v. State*, 65 Miss. 44, 3 South. 188, 7 Am. St. Rep. 634.

Reversed and remanded.

NOTE (by J. F. G.)—In commendable contrast with the slow action of many appellate tribunals, the above opinion was delivered just five months and four days after the previous reversal. This case found its way back to the lower court, was retried and again passed upon by the Supreme Court in less time than frequently passes while a case is under advisement. One cause of delay is, evidently, the practice of writing long opinions, which not only takes the time of each judge in writing, but of all collectively when the opinions are read, discussed, and perhaps modified or rejected. The opinions of Judges Price and Calhoun, in this case, as brief, clear, and terse reviews of matters of fact and of law, are models worthy of study by their more

prolix brethren. The opinion in the first reversal, rendered November 23, 1902, (81 Miss 374, 33 So. Rep. 2), is as follows:

CALHOON, J. Appellant was indicted for the murder of his own father, and convicted of manslaughter. He was sentenced to imprisonment for 40 years, which is practically equivalent to conviction of murder with direction of the jury to imprison him for life. Whether the homicide was manslaughter or justifiable in self-defense is, in our view of the record, a close question on the testimony of the witnesses and on the physical facts. The jury determined it to be manslaughter, and their conclusion would not be disturbed without error of law. But the mere fact that the question of guilt is so close, and the penalty so grave, make it quite important that the trial should be free from serious error of law.

If general violence of demeanor and vindictiveness of disposition authorized conviction of felonious homicide, it appears from the squints of this record that the deceased in his lifetime was, and that the accused and others of his family are, in continual jeopardy. David Mackmasters, brother of the defendant, was produced by the State as a witness against him. He was asked on cross-examination whether he was not, up to the then present time, at deadly enmity with the accused, and at various times carried a gun to shoot him. We think this question called for answer to show the animus of the witness as affecting his credibility.

Defendant's objection to a question by the State on the cross-examination of his witness, Joseph Marlow, Sr., as to threats and threatening demonstrations by accused about and to deceased four or five years before the trial should have been sustained, as we think, as too remote. The wife of the defendant, Mrs. Nan Mackmasters, was an important witness for him, and we think it was error to permit the district attorney to develop to the jury, in cross-examining her, that she was the mother of two children not born in wedlock. This had no relevancy to the issue, and was too heavy a load to put on defendant before an average jury in so grave a trial.

Reversed and remanded.

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### WHITLEY V. STATE.

78 Miss 255—28 So. Rep. 852, 53 L. R. A. 402.

Decided Nov. 12, 1900.

CONFESSIONS:\* *One made to a mob inadmissible—Effect on a subsequent confession.*

1. A confession procured from a prisoner, by threatening to deliver him to a mob, should be promptly rejected; and not be permitted to be heard by the jury, and then stricken out.

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\*See CONFESSION in Table of Topics.

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2. A subsequent confession is presumed to have been made under the same influence; unless the contrary is clearly proven.
3. The fact that in the second confession the prisoner states the hiding place of money, said by him to have been taken at the time of the crime; but no identification of the money being made, adds no weight to such confession.

Appeal from the Circuit Court, De Soto County; Hon. Z. M. Stephens, Judge.

John Whitley, convicted of murder, appeals. Reversed.

*Farley & Lauderdale*, for the appellants.

*Monroe McClurg*, Attorney General, for the State.

TERRAL, J. John Whitley was sentenced to be hanged by the Circuit Court of De Sota County, and he appeals from the judgment of the court. Meriwether and Gore, the latter being deputy sheriff, rescued the defendant from the hands of a mob, and held him in custody for the murder of Brice Martin. On the day of the arrest, upon the threat of Meriwether and Gore to deliver him back to the mob unless he should confess to the killing of Martin, and upon their assurance that the mob would kill him if delivered to them, the defendant made a circumstantial statement of the killing of the deceased without any provocation, and of getting from Martin's person a sack containing \$6.50 or \$7.50, and of hiding the money at a certain place designated by him, and known to them, where the next day the sack and money were found. These confessions were admitted by the court as being freely and voluntarily given, and proof also was made as to the finding of the sack and money where the prisoner stated them to be, upon which much value seems to be set by the prosecution. On the next day after the making of the first confession, while going out to get the money and sack hidden by the defendant, being in charge of Sheriff Williamson and of Deputy Sheriff Gore and Meriwether, to which two last-named persons the first confessions had been made, the defendant, at the insistence of Gore, made a second confession, both to Gore and to Williamson, of the killing of Martin, without any cause, except that Martin "fussed" at him for spitting upon him. Gore says that he assured Whitley that he was safe from

the mob, and insisted that he should then tell the truth of the matter to him and to the sheriff; but it is to be noted that the parties then were in search of evidence to corroborate and fortify the vicious confession of the day before. There was other evidence in the case not necessary to be here recited.

Before the case was submitted to the jury, the court excluded the confession of Whitley made on the day of his arrest, but refused to exclude the evidence relating to the finding of the money and sack containing it, which Whitley said he had gotten from the person of the deceased, and had hidden, and which was found where he said it had been hidden. The motion of the defendant to exclude the confessions made the day next after the arrest was overruled.

The court properly excluded the confessions made to Meriwether and Gore under threat to deliver him back to the mob unless he should confess. It was incompetent. It should not have been admitted in the first instance, but should have been promptly rejected when offered, before reaching the ears of the jury. It was but tardy justice to exclude this evidence upon a second objection to it, after its baleful influence had affected the minds of the jury; but what relation the sack and money, concerning which the evidence was not excluded, had to the case it is difficult to see. The finding of the sack and money where Whitley said they could be found is certainly no more nor stronger evidence than if found upon his person. Neither money nor sack was identified, and if they had been found on the person of Whitley they proved nothing. The admission of the circumstances relating to the money and sack containing it is not justified by anything said by the court in *Belote' Case*, 36 Miss. 96.

It is said that the confession made the day after the arrest to Gore, the deputy sheriff, to whom on the day before he had confessed under a threat of handing him over to the mob if he did not confess, and his confession made at the same time or on the same day to Sheriff Williamson, at the insistence of Gore, should be excluded, because it is not shown that the influence of the threats of the day previous had ended or had ceased to operate; and the court is of the opinion that the objection is well

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taken, and that said confessions should have been excluded. The second confession was made the next day after the first, and while the parties to whom it was made were in quest of circumstances to fortify the first one, and there is ground to suppose the influence first operating upon the defendant's mind was still affecting it. Where a confession is made under the influence of threats, such influence is presumed to continue until removed by evidence, and a subsequent confession will not be received unless the influence of the first confession is shown to have been totally done away with by a warning of the consequences of a confession or by other means. 1 Greenl. Ev., § 221; *Peter v. State*, 4 Smedes & M. 31; *Van Buren v. Same*, 24 Miss. 516; *Simon v. Same*, 37 Miss. 288. Reversed and remanded.

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MCNISH et al. v. STATE.

— Fla.——34 So. Rep. 219—21 Chl. Law J. 1432.

Decided March 24, 1903.

CONFESSIONS:\* *Affect of public excitement—Plea before magistrate—Second confession—Instructions.*

1. Pleas of guilty before a committing magistrate are not admissible as voluntary confessions, where the defendants had not been warned that such pleas might be used against them, especially when the investigation was held amidst considerable excitement, and under threats against their lives.
2. When a confession has been obtained through illegal influence, a subsequent similar confession cannot be shown, unless it clearly appear that such influence had been removed at the time such subsequent confession was made.
3. A charge that, if the jury believe the defendants did not commit the crime, they should acquit, should not be given as an isolated proposition. It may lead the jury to believe the defendant must prove his innocence.

(Syllabus by the Court.)

Error to the Circuit Court, Columbia County; Hon. Bascon H. Palmer, Judge.

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\*See CONFESSION in Table of Topics.

Ben McNish and others, convicted of breaking and entering a dwelling house, bring error. Reversed.

A. J. Henry, for the plaintiffs in error.

William B. Lamar, Attorney General, for the State.

COCKRELL, J. The plaintiffs in error were jointly indicted, tried, and convicted of breaking and entering a dwelling house with intent to commit a felony.

The State was permitted, over the objections of the plaintiffs in error, hereafter called the "defendants," to introduce in evidence the proceedings on the defendants' preliminary examination before a justice of the peace, acting as committing magistrate, wherein they had pleaded guilty, one for burglary, and two as accessories thereto. It had been shown that the constable who was still in charge of these defendants had recently before promised one of them that it would be easier for him if he confessed, and an alleged confession so induced had been ruled out by the court. It had further been shown that the justice had called upon them to say whether they were guilty or not guilty, and they were not cautioned or informed that the matter of the plea might be used against them in another trial. Under the circumstances above recited the admission of these pleas was prejudicial error. The justice had no jurisdiction to try the offense charged, but merely "to ascertain whether there is good ground to hold the accused to bail." Rev. St. 1892, § 2874.

This court has held strictly to the rule that confessions of the accused should be acted upon with great caution, and it has been clearly shown that, when a confession has once been obtained through illegal influence, such influence has been removed before a subsequent confession may be received. We have also emphasized the duty of a committing magistrate to caution the accused that any statement he may make may be used against him, and to inform him of his rights in the premises. *Coffee v. State*, 25 Fla. 501, 6 South. 493, 23 Am. St. Rep. 525; *Jonah Green v. State*, 40 Fla. 474, 24 South. 537; *Anthony v. State*, 44 Fla. —, 32 South. 818. See, also, *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568 (10 Amer. Crim. Rep. 547); *Rex v. Green*, 5 Carr. & P. 312; *Regina*

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*v. Arnold*, 8 Carr. & P. 621. The conditions surrounding this preliminary hearing emphasized the propriety of this rule. It was held amidst considerable excitement, and there is uncontradicted testimony that threats against the lives of the accused were being made, unrebuked by the officer in whose custody and under whose protection they were.

It is also assigned as error that the court gave this charge: "If you believe from the evidence that the defendants at the bar, or either of them, did not break or enter this building, it will be your duty to acquit them, or either of them, that you believe did not commit the offense." While it is unquestionably the law that, where the evidence proves a defendant innocent of the crime, it is the duty of the jury to acquit, the charge is subject to the criticism that it may lead the jury to believe that the defendant must prove his innocence, and not that the State must prove his guilt beyond a reasonable doubt. As an isolated proposition, the charge is misleading, and should not be given.

We think it unnecessary to notice other assignments, as the questions presented thereby need not arise on another trial.

Judgment reversed, and a new trial awarded.

*Statements made by a prisoner, on preliminary examination, before being advised of his rights, are not admissible as voluntary confessions.* In *State v. Andrews*, 35 Or. 388, 58 Pac. Rep. 765, decided October 30, 1899, the court said:

"In view of another trial, it becomes important to consider some of the alleged errors which may be avoided thereat. Evidence was introduced at the trial which tended to show that the pictures alleged to have been exhibited by the defendant were contained in a nickle in the slot machine. The court, over defendant's objection and exception, permitted evidence to be offered of what he said at his preliminary examination before the justice of the peace, tending to show his ownership of said pictures, without it being shown that he was cautioned as to his legal rights, or that such statements were voluntary. The organic law of the State provides that no person shall be compelled in any criminal prosecution to testify against himself (Const. Or., art. 1, § 12); and our court, giving to this clause the liberal construction to which it is entitled, has held that, before the confessions of a defendant can be received in evidence in a criminal action, it must appear that they were voluntarily made. *State v. Moran*, 15 Or. 262, 14 Pac. Rep. 419. The transcript shows that the defendant is an Indian, unused to judicial proceedings, who, in charge of an officer, was present before the justice of the peace for examination on a criminal charge; and when the complaint was read, in the absence of his attorney, made



statements which might tend to incriminate him. The crime with which he was charged was not within the jurisdiction of the justice's court (Hill's Ann. Laws Or., 1870), which was powerless to do more than order him to be held to answer the charge (*Id.*, § 1608). The defendant could have made a written statement in that court in explanation of the facts alleged against him, but before he could be bound thereby it must have appeared that he was informed of his rights by the magistrate. *Id.*, §§ 1594, 1598; *State v. Hatcher*, 29 Or. 309, 44 Pac. Rep. 534. The justice's court having no authority to try the defendant for the crime charged, his statements cannot be deemed a plea of guilty; nor are they in the nature of voluntary declarations against interest, made to an officer or person concerning the offense. But such statements were equivalent to testimony extorted from him when a prisoner at his preliminary examination. His situation rendered what he might then say concerning his guilt in the nature of a confession, and, there being no evidence that he was advised of his rights, or cautioned that any statement he should make might be urged against him in his subsequent trial, such confession was not voluntarily made, and the court erred in admitting it in evidence. 1 Greenl. Ev., § 225; 3 Rice, Ev., p. 356; *State v. Young* (Mo.), 24 S. W. Rep. 1038; *Lancaster v. State* (Tex. Crim. App.), 31 S. W. Rep. 515; *Bradford v. State* (Ala.), 18 So. Rep. 107."

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### STATE v. GROVER.

96 Me. 363—52 Atl. Rep. 757.

Decided April 11, 1902.

**CONFESSIONS:**\* *Promises of favor—Subsequent confession—Burden of proof.*

1. A confession is not admissible when made under circumstances that show it to have been extorted by threat or obtained by promise of favor, and made to avoid the threatened danger or to obtain the benefit promised.
2. "This rule of exclusion was adopted, not because such confessions have no probative force at all, but out of tenderness for the respondent, in view of his unfavorable and even dangerous position." The strictness with which the rule was applied when the accused was without counsel and not permitted to testify has left less support in reason, and no more can be left to the jury to determine.
3. To make a confession voluntary it is not necessary that it be volunteered; but it may be in response to questions.
4. After the court admits a confession the jury may exclude it.

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5. In determining whether the confession is admissible or not, the court should hear evidence for both sides.
6. The decision of the presiding judge, as to the competency of a confession, is not subject to review by an Appellate Court; but is on appeal to the jury trying the case.
7. Confessions are presumed to be voluntary; the burden being on the accused to remove that presumption.
8. At the trial, three confessions were offered; one was rejected and the others admitted in evidence. Held, no error. For the facts see opinion.

Exceptions from Supreme Judicial Court, Cumberland County.

Cleveland Grover, being convicted of wilfully and maliciously setting fire to the dwelling house of another, brings exceptions to the rulings of the presiding judge in admitting two certain confessions in evidence. Exceptions overruled.

Argued before WISWELL, C. J., and EMERY, WHITEHOUSE, STROUT and PEABODY, JJ.

R. T. Whitehouse, for the State.

W. H. Gulliver, for the defendant.

EMERY, J. The exceptions in this case raise the question of the legal admissibility in evidence of extrajudicial confessions by the respondent in a trial for crime. The decided cases upon this question are so numerous and conflicting that it is useless to attempt their consideration. They vary in different jurisdictions, and also from time to time in the same jurisdiction. Hence we shall content ourselves with the statement of a few principles and with a few citations.

Confessions by the respondent that he committed the offense for which he is being tried have *prima facie* some probative force, and hence, as a general rule, are admissible in evidence against him. The value of such evidence is, of course, wholly for the jury. When, however, the confession was made under such circumstances as to show that it was extorted from the respondent by some threat, or drawn from him by some promise, and was made to avoid the evil threatened, or to obtain the good promised, rather from a desire to relieve his conscience or to state the truth, it is regarded by the law as involuntary, and hence not to be used against him. This rule of exclusion was adopted,

not because such a confession has no probative force at all, but rather out of tenderness for the respondent, in view of his unfavorable and even dangerous position. In earlier days, when the respondent could not have counsel, and could not testify in his own behalf, the courts were ordinarily and properly quite strict in keeping from the jury evidence of confessions when there was any reasonable doubt of their being voluntary. Since the respondent is now allowed counsel, and is also allowed to testify in explanation of his acts and statements, there is less reason for such restrictions, and more may be left to the jury as to the probative force of such confessions.

In this State, in *State v. Grant*, 22 Me. 171, this court quoted the old rule of exclusion laid down by *Warickshall's Case*, 1 Leach, 298, and then said, apparently with approval, "This rule appears to have been limited by subsequent cases, so that there must appear to be some fear of personal injury, or hope of personal benefit of a temporal nature, to exclude the confession." In that case the respondent was told that he had better confess, in order to save his brother from jail, but no assurance was given him that he himself would fare any better by confessing. A confession thus made was held admissible. The statement of the rule above quoted from *State v. Grant* was approved in *Commonwealth v. Morey*, 1 Gray, 461. In a later case in Maine (*State v. Gilman*, 51 Me. 206, 223) this court again said concerning the rule of exclusion of statements made by a respondent: "The true test of admissibility in this class of cases is, was the statement offered in evidence made voluntary—without compulsion? If this proposition be answered in the affirmative, then the statement is clearly admissible in principle; but, if not voluntary—if obtained by any degree of coercion—then it must be rejected." In 1 Greenl. Ev. 219, it is said: "The material inquiry, therefore, is whether the confession has been obtained by the influence of hope or fear applied by a third person to the prisoner's mind."

To make a confession voluntary in the legal sense, it is not necessary that it should be volunteered, or made without request or interrogatory. It is voluntary, though made in answer to questions or even solicitations, if it be made from the free, un-

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restrained will of the respondent. Again, the constraint, to make a confession involuntary, must come from without—be imposed by some other person, apparently vested with power to punish or reward. Hence if without such outside interference the respondent himself reasons that he had better confess, simply in order to avoid some temporal evil impending over him, or to obtain some temporal personal good, his confession is still voluntary; being from his unconstrained will. The foregoing we think is a sufficient exposition of the law of this state applicable to this case.

But the question whether a particular confession offered in evidence was voluntary, or was obtained by constraint or coercion, as above defined, is not a question of law. It is to be determined by evidence. The evidence upon this issue may be conflicting and confused. Even when the evidence is uncontradicted, different inferences may often be drawn from it by different men, and each inference be logically possible. Hence the question must be determined by the presiding justice as a question of fact. In 1 Greenl. Ev. 219, it is stated that the matter rests wholly in the discretion of the judge. Upon exceptions to his opinion on this question the law court should not reverse his decision merely because it would itself have come to a different conclusion, but only when the circumstances are such that it can say, as matter of law, that the confession was not voluntary in the legal sense. It will regard the findings of the presiding justice upon this question of fact, as it does the findings of a jury upon questions of negligence, as entitled to stand unless the contrary inference is the only reasonable one. For the law court to set aside a verdict of conviction merely because it differs from the presiding justice upon a preliminary question of fact which must necessarily be decided by him would cause intolerable delays and expense in the enforcement of the criminal law. At the second trial the evidence upon this preliminary question might be very different from that at the first trial, and require a new decision upon the new evidence, subject to be set aside by the law court, and so on until it shall happen that the trial judge and the reviewing judges agree in their views of the same evidence.

It should be remembered that if the presiding justice does err in his finding of fact, and admits the confession in evidence when the justices of the law court would not, the respondent can then appeal to the jury to exclude it from consideration as improperly obtained, and can show all the circumstances tending to destroy or weaken its probative power. He can also require the presiding justice to instruct the jury it should not give credit to the confession if thus improperly obtained.

In *Commonwealth v. Preece*, 140 Mass. 276, 5 N. E. Rep. 494, the court said: "When a confession is offered in evidence, the question whether it is voluntary is to be decided by the presiding justice. If he is satisfied that it is voluntary, it is admissible; otherwise it should be excluded." After reviewing the evidence, the court further said: "As the evidence was conflicting, we cannot say, as matter of law, that the decision of the presiding justice admitting the evidence was erroneous." In *Commonwealth v. Culver*, 126 Mass. 464, it was held that upon this preliminary question the presiding justice was bound to hear evidence offered by the respondent, as well as the evidence offered by the State.

It remains to apply these legal principles to the case at bar. The respondent was arrested and indicted for setting fire to the dwelling house of Mrs. McKeen. After the constable had arrested the respondent, he drove with him to the selectmen's office, and called out the chairman of the board. On the chairman reaching the carriage, the constable said, "This is the boy that set the fire." The selectman said, "Did you set this fire, Cleve?" He answered that he did. The selectman then asked how he did it, and he answered that he wanted to get even with Mrs. McKeen. The next day the insurance commissioner, Mr. Carr, in company with the selectman and the constable, visited the respondent in his room in the police station, and, after introducing himself, told him he was under no obligation to make any statement. The respondent answered: "That is all right. I committed the crime, and I know I have got to be punished for it."

It is not contended that at either of these interviews anything was said, in the way of threat or promise, to induce a confession

of guilt; but the admissions were made to the constable, and to these is added the fact that he detailed the respondent abouts at night, and the fire, and after respondent's confession in evidence, he told him I did not lie along a little while likes me. well own up that he might for him to you to lie to stable vigor of what would be denied or admitted.

The presiding justice thus made the confession to the chairman of the board. The chairman based on his statement as the result of which confession.

When it comes to confessions the respondent is not to be expected of the evidence was the confessions admitted temporal nature.

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NOTE.—When promises, suggestions, or threats are made, the range of time

of guilt; but the respondent does contend that these confessions were directly induced by threats and promises made by the constable at the time of the arrest. The only evidence as to these is from the constable himself. Upon cross-examination he detailed his conversation with the respondent as to his whereabouts at night during the week of the fire and on the night of the fire, and as to his trouble with Mrs. McKeen, and then said, after respondent denied his guilt: "I told him I thought I had evidence enough, of some matches he had purchased, and told him I didn't think it would be any worse for him, if he done it, not to lie about it, than it would to own up. And we talked along a little while, and he says: 'Everybody in Brunswick dislikes me. I don't care what happens to me. I might just as well own up that I set the fire.'" The constable also testified that he might have said to the respondent that it would be better for him to tell the truth; that he used the words: "I don't want you to lie to me. I want you to tell me the truth." The constable vigorously denied that he made any threats or promises of what would or might happen to the respondent in case he denied or admitted his guilt.

The presiding justice excluded from the jury the confession thus made to the constable, but admitted the confessions made to the chairman of the selectmen and to the insurance commissioner. The ruling admitting those confessions was, of course, based on his finding, as matter of fact, that they were not made as the result of any threats or promises made by the constable which constrained the free will of the respondent.

When it is remembered that in the absence of evidence all confessions are presumed to be voluntary, and the burden is on the respondent to rebut that presumption by evidence, we cannot be expected to say, upon this evidence, and against the finding of the presiding justice, that his inference from the evidence was logically impossible; that, as matter of law, the confessions admitted were the result of threats or promises of a temporal nature.

Exceptions overruled. Judgment for the State.

*NOTE.—When one confession is incompetent, because procured by promises, suggestions or threats, subsequent confessions, not remote in range of time, are presumed to result from the same promises, sugges-*

tions or threats; unless such presumption is rebutted by the evidence, or the circumstances surrounding the confession. *Barnes v. State*, 38 Tex. 356; *State v. Sims*, 43 La. Ann. 532, 9 So. Rep. 113; and notes 11 Am. Crim. Rep. 290; also *Whitley v. State*; *Williams v. State*; *State v. Force*; *McNish v. State*, and *Mackmasters v. State* in the present volume.

The Court below having rejected the first confession as one procured by improper influence, the second and third confessions following without any considerable lapse of time, would be presumed to result from the same influence, unless the contrary appears from the evidence, the circumstances, or from the confessions themselves. This presumption finds support in the fact that the second confession was made while the prisoner was still in the actual, and we might say the physical, custody of the constable and in his presence and hearing, while the third confession was both in the presence of the constable and the selectman. The frankness with which the prisoner spoke, and the caution given by the insurance commissioner, together with the manner and character of the witnesses, and other matters which naturally would not appear in the opinion, may have furnished a proper basis, upon which the court in the exercise of a sound discretion was justified in admitting those confessions.

The record before the Supreme Court, probably contained much more evidence on this phase of the case than is recited in the opinion; but from the statements in the opinion, it would seem that at least the second confession was subject to the presumption, that it was burdened by the same infirmity, which in the opinion of the court below, rendered the first confession incompetent.

Under one of the rules announced in the above opinion the action of the court below in excluding the first confession, unless clearly erroneous, should be accepted as conclusive, leaving as the sole inquiry: Were the second and third confessions tainted with the infirmities of the first? Wandering from this issue in an effort to announce general rules as to confessions, the court rendered an opinion not only self-contradictory, but at variance with both the law and the history of confessions.

*A paradox.*—It is difficult to understand why a confession made by a prisoner "to avoid the evil threatened, or to obtain the relief promised, rather than from a desire to relieve his conscience or to state the truth . . . is regarded by the law as involuntary, and hence not to be used against him;" yet, that this rule was adopted, "not because such a confession has no prohibitive force at all, but rather out of tenderness for the respondent in view of his unfavorable and even dangerous position."

Courts are instituted to administer the law, and evidence is used as a means of ascertaining the truth. That which *prima facie* does not assist the court in ascertaining the truth does not possess the character or true quality of evidence, and is incompetent and even dangerous to the course of justice; while that which assists in determining the issue, is always acceptable, unless excluded by the doctrine of public policy.

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If tenderness toward the accused excludes one class of testimony, why not exclude all testimony because of its tendency to produce harsh results; or in case of conviction, sentence the accused to be imprisoned in the parlor, or to be hung by a rope of entwined sunbeams.

But the court insists, that since defendants in criminal cases have been granted the privilege of counsel and the right to testify in their own behalf, the reason for such "tenderness" has ceased. Thus an involuntary confession bearing the impress of falsity, and extorted from one who has no counsel, immediately upon the employing of counsel becomes a voluntary statement freely flowing from the fount of truth; and that the granting of the right to testify (a right which should always have been recognized), opens the door for the admission of involuntary and doubtful confessions in evidence, which, to refute or explain, obligates the defendant to present himself (at least to some degree), as a self-impeached witness, whose statements may have but little weight with the jury. Jurors may be gentlemen of high order of honor and intelligence; but they are not presumed to readily and fully comprehend the policy of the law based upon judicial experience; and may place more reliance upon a false confession than upon a truthful statement made by the defendant as a witness.

*Commonwealth v. Morey* cited in the opinion rather refutes than sustains the doctrine announced; see quotation from this case on page 61 of the present volume.

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#### COMMONWEALTH V. ANTAYA.

184 Mass 326—68 N. E. Rep. 331.

Decided Oct. 22, 1903.

CONFESSIONS: \* *Province of court and jury in passing upon confessions.*

"When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admitted, otherwise it is rejected. But, even if it is admitted, the jury may disregard it if they are not satisfied that it is voluntary."

Exceptions from the Superior Court, Worcester County;  
Hon. J. H. Hardy, Judge.

Felix Antaya, convicted of larceny, brings exceptions. Exceptions overruled.

Charles C. Milton, H. H. Thayer and J. P. Morrissey, for the appellant.

Rockwood Hoar and George F. Taft, for the Commonwealth.

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\*See CONFESSION in Table of Topics.



HAMMOND, J. When a confession is offered in evidence, the question whether it is voluntary is to be decided primarily by the presiding justice. If he is satisfied that it is voluntary, it is admitted; otherwise it is rejected. But, even if it is admitted, the jury may disregard it if they are not satisfied that it is voluntary. *Commonwealth v. Preece*, 140 Mass. 276, 5 N. E. Rep. 494; *Commonwealth v. Bond*, 170 Mass. 41, 48 N. E. Rep. 756; *Commonwealth v. Reagan*, 175 Mass. 335, 56 N. E. Rep. 577, 78 Am. St. Rep. 496, and cases cited. In putting in its case the government introduced two witnesses, who, against the objection of the defendant, were allowed to testify to certain statements made by him in the nature of a confession. It is to be assumed that at the time this evidence was offered the presiding justice, upon the case as it then stood, was of opinion that the confession was voluntary. It was therefore properly admitted at that stage of the case, unless, as matter of law, the judge was not justified in coming to that conclusion. *Commonwealth v. Bond*, 170 Mass. 41, 43, 48 N. E. Rep. 756. Without here reciting the evidence in detail, it is sufficient to say that it warrants the conclusion. The first request, therefore, was properly refused.

It subsequently appeared that one Shea, a police officer, "took part after a while in the conversation with" the defendant, and told him "it would be better for him and all concerned to tell the truth." The Government witnesses testified that Shea did not say this to the defendant until the latter had made the whole confession testified to by them. The defendant testified that Shea's statement was made earlier in the conversation, and before parts of the confession put in by the Government had been made. Upon this the jury were instructed not to consider any of the conversation which they found to be subsequent to the statement of Shea. It is now argued by the defendant that it was the duty of the judge either to pass upon the confession as a whole, or to designate what part was made before Shea's statement, and to admit only that part; and that the action of the court in leaving to the jury the question of the dividing line was wrong. It is, to say the least, doubtful whether this point is open to the defendant upon this record. He was trying to have

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the whole confession excluded, and the instruction to the jury to disregard the portion made after Shea's statement was, to that extent, favorable to him. The court was not asked to find the dividing line, and the defendant does not appear to have excepted to this method of leaving the question to the jury, except so far as it was inconsistent with the request that the whole be excluded. But, if the point be open, the obvious answer is that, even if it was the duty of the judge to pass upon the question as a whole, there is nothing in the record to show that he did not do it. Indeed, the fair inference from the record is that, so far as respected the preliminary question of admission, he was of the opinion that the whole confession was made prior to Shea's statement. Since, however, the jury had the right to pass finally upon that question, the matter was left to them, and they were instructed to act as they should find the facts to be. This was in accordance with the well-established practice. *Commonwealth v. Cuffee*, 108 Mass. 285. See, also, cases cited in *Commonwealth v. Reagan*, 175 Mass. 335, 56 N. E. Rep. 577, 78 Am. St. Rep. 496.

The second request would have required the jury to reject the confession even if any part of the conversation, in no way material to the questions involved, had been omitted from the evidence. It was therefore rightly refused.

Exceptions overruled.

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STATE v. PARKER.

132 N. C. 1014—43 S. E. Rep. 830.

Decided April 7, 1903.

CONFESSIONS\*—PRACTICE: *Drawing the jury—Confession under oath—Warning.*

1. Where jurors have been drawn in the presence of the court by a boy over ten years old, no challenge being made to the array, and the jurors being apparently satisfactory to both the State and the defendant, the objection comes too late on motion in arrest of judgment.

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\*See CONFESSION in Table of Topics.

2. The statutes of North Carolina permit the committing magistrate to examine the defendant; but he must first inform the defendant of his right to refuse to answer any question, and that his silence will not in any degree be used against him. The magistrate has no power to require such examination to be under oath. If an oath is administered, the answers of the defendant will be regarded as statements made under compulsion.
3. Answers of a defendant taken under oath before a committing magistrate, are not competent to be used upon the trial; nor are they proper subjects for comments by a prosecuting attorney; nor do they furnish a basis for cross-examination.

Appeal from the Superior Court, Durnham County; Hon. McNeill, Judge.

John Parker, being convicted of crime, appeals. Reversed.

*Jones Fuller*, for the appellant.

*Robert D. Gilmer*, Attorney General, for the State.

WALKER, J. The defendant was indicted for unlawfully and carnally knowing and abusing a female under the age of ten years; the indictment having been drawn and found under section 1101 of the Code, by which the offense is made a capital felony. The defendant was convicted, and to the judgment pronounced he excepted and appealed. He assigns two errors as having been committed by the court during the course of the trial.

A special venire of twenty-five freeholders was summoned under the order of the court, whose names were drawn from the jury box, in the presence and under the direction of the court, by a boy who was over ten years of age, and five of the jurors so drawn were taken and served upon the jury. There does not appear to have been any challenge or objection to any of them. So far as it does appear, they were each and all perfectly acceptable to the State and defendant. After the verdict of guilty had been returned by the jury, the defendant, through his counsel, moved in arrest of judgment upon the ground that the special venire had been drawn by a boy over ten years of age, and that five of the venire had served as jurors in the case. The motion of the defendant to arrest the judgment was properly overruled. It was too late after the verdict to present any

objection to the venire by the defendant; he should have been treated as a party to the case of the venire. At least with reference to the venire there was no objection as the venire was drawn by a clerk before the trial was not commenced. The defendant failed to object to the venire before the trial commenced. The regulation of the venire is a matter of a special regulation or of a special regulation strictly observed. The statute requires the faith or confidence of the State v. P. Dixon, 13 Wood, 28. The venire was drawn by a boy over ten years of age, and five of the jurors so drawn were taken and served upon the jury. There does not appear to have been any challenge or objection to any of them. So far as it does appear, they were each and all perfectly acceptable to the State and defendant. After the verdict of guilty had been returned by the jury, the defendant, through his counsel, moved in arrest of judgment upon the ground that the special venire had been drawn by a boy over ten years of age, and that five of the venire had served as jurors in the case. The motion of the defendant to arrest the judgment was properly overruled. It was too late after the verdict to present any

objection to the manner of selecting the jurors for the special venire by a motion in arrest of judgment. Even if the motion be treated as substantially one for a *venire de novo* (and in a case of this magnitude we would be so disposed to treat it, at least with the consent of the Attorney General, provided that there was real merit in the motion), it could not be sustained, as the proper method of taking advantage of the irregularity is by a challenge to the array, or by a motion to quash the panel before the jury are sworn and charged with the case. As this was not done, there was a waiver of the objection, and the defendant forfeited his right to insist upon it thereafter. The regulations and requirements concerning the drawing of a jury or of a special venire may be directory, but they should be strictly observed. A failure, though, to follow the directions of the statute, will not invalidate the panel in the absence of bad faith or corruption, or other adequate cause for setting it aside. *State v. Perry*, 122 N. C. 1021, 29 S. E. Rep. 384; *State v. Dixon*, 131 N. C. 810, 42 S. E. Rep. 944. In *State v. Underwood*, 28 N. C. 96, where the grand jury was drawn by a boy thirteen years of age, and it was contended that such illegal drawing might have affected the composition of the petit jury, the prisoner moved for a new trial, and also in arrest of judgment; and the court held that the objection, if a valid and sufficient one at any time, should have been made after the petit jury were sworn, and should be in the form of a challenge to the array. We believe the general rule to be that, where the objection is to the whole list or panel, it must be taken by challenge to the array or by motion to quash the panel, which must be made as soon as the facts which warrant it become known; and it is generally held that the challenge or objection must be interposed before entering on the formation of the jury, and before the interposition of challenges to the polls, or before the jury has been completed or made up or has been sworn, or before entering on the trial; and it is certainly too late after trial and verdict, on a motion for a new trial. 12 Enc. Pl. & Practice, 424; *State v. Speaks*, 94 N. C. 865; *State v. Boon*, 82 N. C. 637; *State v. Douglass*, 63 N. C. 500. The court therefore did not err in overruling the motion to arrest the judgment.

But we think there was error committed by the court in the admission of testimony to which the defendant duly objected, which entitles him to a new trial. The defendant testified in his own behalf after the State had close its evidence, and on the cross-examination the solicitor was permitted to ask him if his statements during the trial below did not contradict that made at the preliminary hearing before the committing magistrate, and proposed to call his attention to certain statements of the defendant contained in the evidence before the magistrate, which had been reduced to writing and signed and sworn to by him. It appeared that the defendant had been sworn before he testified at the investigation before the magistrate, and that his testimony was taken in the presence of other witnesses. It is also stated in the case that he was examined by the magistrate "after being cautioned." That is all. It does not appear in what way he was cautioned or what was said to him by the magistrate before he testified. It is provided by the statute (Code, §§ 1145-1149) that, after examining the complainant and the witnesses for the prosecution, the magistrate shall then proceed to examine the prisoner. The examination shall not be on oath, and before he is examined the prisoner shall be informed of the charge against him, and shall be allowed reasonable time to send for and advise with counsel. At the commencement of the examination the prisoner shall be informed by the magistrate that he is at liberty to refuse to answer any question that may be put to him, and that his refusal to answer shall not be used to his prejudice at any stage of the proceeding. Answers shall be read to the prisoner, when he may correct or add to them; and, when made conformable to what he declares is the truth, they shall be certified and signed by the magistrate. After the examination of the prisoner is completed, his witnesses, if he have any, shall be sworn and examined, and he may have the assistance of counsel in such examination. The witnesses produced on the part either of the prisoner or of the prosecution shall not be present at the examination of the prisoner. The provisions of this statute, which is substantially a copy of that of 11 & 12 Vict., which was itself an amendment and enlargement of the earlier statutes of 2 & 3 Phillip &

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Mary and 7 Geo. IV on the same subject, have received a uniform interpretation, so far as they affect the particular question under consideration. It was intended by them to safeguard the rights of the prisoner as guaranteed by the law, and to afford him every protection against imposition, oppression, or undue influence, so that what he may say in any investigation in regard to the accusation against him may be entirely voluntary. This provision of the law should at all times and under all circumstances be rigidly observed. It was the purpose and intent that the person under examination, who is accused of crime, should feel free to admit or deny his guilt, and the oath which is forbidden by statute deprives him of this perfect freedom. We must hold, therefore, as it has always been determined by this and other courts, that any admission or confession made by the prisoner before the committing magistrate, whether reduced to writing or not, which was made while he was under the compulsion of an oath, was not voluntary, and should not have been received in evidence; nor should the solicitor have been allowed to refer to it or to comment upon it, or to use it either directly or indirectly for the purpose of contradicting the defendant on the cross-examination of him. *State v. Broughton*, 29 N. C. 96, 45 Am. Dec. 507; *State v. Matthews*, 66 N. C. 106; *State v. Young*, 60 N. C. 127. The rule in regard to the confession of a prisoner, made while under oath, was so strictly enforced in England that when the magistrate returned his examination in writing to the court, and it was therein stated that the prisoner was sworn, the prosecution was not allowed to contradict this averment. *Reg. v. Pikesley*, 9 C. & P. 124; *Rex v. Rivers*, 7 C. & P. 177; *Rex v. Smith*, 1 Starkie, 242. This is not the rule here, and it is merely referred to in order to show with what strictness the rule was sometimes enforced, and how careful the courts have been to see that the prisoner, at the time his statement was made before the magistrate, was absolutely free and unrestrained.

It does not appear in this case that the prisoner was cautioned as required by the statute; that is, in the manner therein prescribed. It merely appears that "he was cautioned," but in what this caution consisted—whether he was advised as to his

rights or told by the magistrate that he was at liberty to refuse to answer any question put to him, and that his refusal to answer could not be used against him at any stage of the proceedings, or what was said to him in this connection—in no way appears. The prisoner objected to the use of this written statement by the solicitor on two grounds: (1) That the statement was taken while he was under oath; (2) that it was taken in the presence of other witnesses. The defendant did not specially assign as one of the grounds of objection that he was not properly cautioned by the magistrate, but we think it sufficiently appears that the objection was really directed against the statement itself, as having been procured in violation of the statute; and we have so treated it, as we are disposed in cases of this kind to be somewhat liberal in our construction of what has been said and done, so as to ascertain the real contention of counsel, and to decide the case upon its substantial legal merits, without too much regard for mere matters of form. The judge should have found as a fact whether the proper caution was given to the defendant before he testified or made his statement at the trial before the magistrate, but, instead of doing so, it appears from the case that no inquiry whatever was made into the matter, and the court made its ruling upon the bare statement that the prisoner "had been cautioned." That, in our opinion, was not sufficient. Mr. Archbold says: "This statute was enacted as a humane provision of the English law to prevent a prisoner from committing himself by any unadvised admission, which otherwise, in his confusion and agitation arising from the proceeding against him, he might make without calculating on its consequences. It is in the true spirit of fairness toward the prisoner which distinguishes the administration of criminal justice in this country from its administration in any other country in Europe." 1 Arch. Cr. Pr. & Pl. (6th ed.), pp. 131, 132.

The defendant was entitled to have the statement excluded from the consideration of the jury, when his objection to it was made, for the reasons we have given, and in failing to exclude it the court erred to the prejudice of the defendant. The verdict must therefore be set aside, and a new trial awarded. New trial.

## CONFESSIONS

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## McVEIGH v. STATE.

43 Tex. Crim. Rep. 17—62 S. W. Rep. 757.

Decided May 1, 1901.

CONFESSIONS: \*—Warning—Promises of favor—Test as to competency of confessions—Instructions—Corpus delicti.

1. The warning to be given a prisoner under the Texas statute is that the confession can be used against him; not that it can be used for or against him. (See also *Guin v. State*, 11 Am. Crim. Rep. 259—50 S. W. Rep. 350.)
2. Where there is a conflict of testimony as to the warning given, if the confession is admitted, the court should instruct the jury upon the law in relation thereto.
3. A citizen who was acting with the sheriff in charge, told the prisoner that if he would confess, he would go upon the prisoner's bond and have the district attorney dismiss the case; after which the sheriff remarked that he would not go that far, but he would use his influence to make it lighter for the prisoner. Held, the confession thereby obtained was incompetent.
4. The real test is, whether under all of the circumstances, a confessing mind was influenced in such a manner as to render its utterance of doubtful character. The hope to bring brief temporal benefit, or to avert punishment, however slight, renders the confession inadmissible.
5. An instruction that the jury should find the defendant guilty, if the jurors believe the confession to have been voluntarily made, is erroneous, in that it directs a verdict on the confession, without other proof of the *corpus delicti*.

Appeal from the District Court, Fayette County; Hon. L. W. Moore, Special Judge.

Martin McVeigh, convicted of burglary, appeals. Reversed.

*Lane & Krause*, for the appellant.

*Robert A. John*, Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary.

The State introduced appellant's confession against him. Appellant excepted on the ground that he was under arrest at

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\*See CONFESSION in Table of Topics.



the time the confessions were made, and was not properly warned, and, if properly warned, that the confessions were made to officers under promises of reward and persuasion. The State's witnesses (the sheriff and his deputy) testify that a proper warning was given, to wit, that they told appellant before he confessed to the theft that same would be used against him as evidence. However, appellant introduced two witnesses who stated that the warning given was that his statement could be used for or against him. If this was the warning given, this confession was not admissible. *Guinn v. State*, 39 Tex. Cr. R. 257, 45 S. W. Rep. 694; *Unsell v. State*, 39 Tex. Cr. R. 330, 45 S. W. Rep. 1022. If this were the only question made as to the warning given, it being a matter of controversy as to the character of warning, one being legal and the other illegal, we would hold that a proper charge of the court, submitting this issue to the jury, was the correct practice. The charge, however, was defective in other respects, which we will point out hereafter. As stated before, it was also objected to the confession that, although the warning given may have been a legal one, yet it was made under such promises by the officers as to render it inadmissible. If there was any controversy between the witnesses as to what was said by the officers to the defendant, the court might, by a proper charge, have submitted this issue to the jury. But the officers themselves admit that they used some language of a persuasive character. Loessin shows that he knew Dr. Clark was a friend of defendant, and was using him to get a confession from him. Clark, it seems, told defendant, if he would make a confession and tell who was assisting him in taking the seed, they would get the district attorney to dismiss the case against him. The sheriff thereupon stated he would not go that far, but, if he would tell about it, it might go lighter with him. Deputy Sheriff Eilers says he told him he ought to tell it, and, if he did, it might go lighter with him, and he had known men to be turned loose by turning State's evidence. Clark says he told defendant, if he would confess, he would go on his bond, and they would get the district attorney to dismiss the case against him. The sheriff then said he would not go that far, would use his influence to make it

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lighter on him. It seems Kesler, who was introduced by the State on this point, testified that Dr. Clark first stated what he had promised Martin; that is, that they would have the case dismissed against him. The sheriff said he could not promise him that, but he would use his influence to make it lighter on him; and after this Martin made the statement, which was that he and three other parties stole the cotton seed. The language here sought to be used to induce the confession is certainly as strong as the language used in *Searcy's Case*, 28 Tex. App. 513, 13 S. W. Rep. 782. In *Thomas v. State*, 35 Tex. Cr. R. 178, 32 S. W. Rep. 771, we laid down the principle governing the admissibility of confessions. We quote from that opinion, as follows: "The real question being, in every case, whether or not the confessing mind was influenced in a way to create doubt of the truth of the confession, an involuntary confession, uttered to bring temporal good or avert temporal evil, even when the contemplated benefit is small, will be rejected. The circumstances under which the confession was made are of very great importance. They must be looked to in all cases, and when this is done, and there is nothing pointing to the motive prompting the confession, it will be received. Now, whether there is an express or implied promise to aid the suspected person, or a threat of temporal injury, or whether the suspected person is told that it would be better for him to confess, etc., does not always solve the question. It is true that the inducement under which the confession was uttered is of prime importance, but not always decisive. The inducement and the surrounding circumstances decide the question. The inducement may not be sufficient to show the motive for the confession, but, when read in the light of the surrounding circumstances attending it, may be ample proof to create doubt of the truth of the confession." Now, when we read the testimony of the State's witnesses in connection with the surrounding circumstances as testified to by them and other witnesses, we are constrained to the opinion that appellant was induced to confess by the promise made to him by the sheriff. It will be observed in this connection that before he made the statement to the sheriff he had already, under the promise made by Dr. Clark, whom the sheriff was using, made

the confession to him. No doubt, he believed Clark was acting for the sheriff, and having already secured a confession through Clark by a larger promise, and though this was in part repudiated by the sheriff, yet, evidently, the previous confession was a part of the transaction and was induced by promises of getting him released from prosecution. Under the circumstances, we believe that the confessions should have been rejected.

On this subject of confessions, we notice the court gave the following charge: "You will determine from the evidence whether there was or was not a confession under such a warning, as before defined, and voluntarily and freely made, as before instructed. If you so find, you will convict defendant, and assess his punishment by confinement in the penitentiary not less than two, nor more than twelve, years." This was evidently a charge on the weight of the testimony; that is, the effect was to tell the jury to convict appellant on his confession alone. This confession went to the jury as any other testimony, but the court had no right to instruct the jury to convict defendant on his confession; it not being a judicial confession.

It is not necessary to discuss other questions, but, for the errors pointed out, the judgment is reversed and the cause remanded.

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#### PETTY V. STATE.

Tex. Court of Crim. App.—65 S. W. Rep. 917.

Decided Dec. 11, 1901.

**CONFESSIONS:** *Warning should immediately precede confession—Witness.*

1. One convicted of stealing a calf is rendered a competent witness by a pardon reciting a conviction for stealing a colt, there being in fact only one conviction.
2. The statutory warning necessary to render a confession competent should immediately precede the confession, or at least be within a reasonable time previous to it; if it does not, the burden of proof is on the State to show that the warning had not lost its effect.

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\*See CONFESSION in Table of Topics.

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Court of Criminal Appeals of Texas.

Appeal from the District Court, Grayson County; Hon. Rice Maxey, Judge.

D. C. Petty, convicted of murder in the second degree, appeals. Reversed.

*S. B. Cox*, for the appellant.

*Robert A. John*, Assistant Attorney General, for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary.

Exception was reserved to the competency of Hawkins as a witness. The record discloses that Hawkins had been convicted of the theft of a calf. The pardon granted him by the Governor stated the conviction had been for the theft of a colt. It was upon this discrepancy the objection was based. Evidence showed that the conviction was for the theft of a calf, and the pardon granted for the case in which the conviction was had. The testimony introduced proved that the only case upon the docket against Hawkins was for the theft of a calf, and the pardon was granted in that particular case, and that it was simply a mistake of the pardoning power in stating the offense for which the party had been convicted. The court's ruling was correct. *Hunnicut v. State*, 18 Tex. App. 498, 51 Am. Rep. 330; *Id.*, 20 Tex. App. 632; *Martin v. State*, 21 Tex. App. 1, 17 S. W. Rep. 430.

This witness Hawkins was permitted to testify to confessions made by appellant to him, while they were in jail together, without being warned as required by the statute. In regard to the warning, the witness Chancellor testified he was the jailer in February, 1899, when witness Hawkins and defendant were confined in said jail; that a few days, and, to the best of witness' recollection, two or three days, before Hawkins was convicted on the charge of theft of a calf, he (Chancellor) stated to defendant that he was charged with the murder of Harris, and any statement that he might make to anybody would be used as evidence against him on his final trial, and that he did not have to talk; that he then took witness Hawkins out, and

informed him of the warning given defendant, and requested him to talk to defendant, and remember anything defendant might say. Hawkins in this connection stated that on the night before his (Hawkins') conviction for the theft of the calf he had a talk with defendant in the county jail, and during this conversation defendant made the statements imputed to him in connection with the killing of Harris. The confession referred to by Hawkins as having been made by defendant the night previous to his (Hawkins') plea of guilty to the theft of the calf was then introduced in evidence. We do not believe this testimony was admissible. The terms of our statute must be complied with, in order to permit the introduction of confessions. The statute evidently intends that the proper predicate must be laid, and must be in such relation to the confession that the party making the confession had it in mind at the time of making his statement. It is not so much a question of time elapsing between the warning and the confession as it is of the fact that defendant made his confession in view of the warning. Usually the confession is in close juxtaposition to the warning, and where it occupies this relation, and it is so close that the party making the confession must have had it in mind, the statute has been met. But if it was remote, then it would be incumbent on the State to show, as best it could, that the party made it in view of the fact that he had been warned. In *Barth's Case*, 39 Tex. Cr. App. 381, 46 S. W. Rep. 228, 73 Am. St. Rep. 935, a similar question arose. On account of the uncertainty of the relations between the warning and the confession, and the terms of the confession under that state of case, the judgment was reversed, the court holding that the confession must be made within a reasonable time after the warning. But if the confessions immediately follow the warning, or within such short period that the warning was in the mind of defendant, or if the confession followed at a more remote time from the warning, and it be made reasonably to appear that defendant had the warning in mind at the time of making the confession, it would be admissible; otherwise it should be rejected. The admission of the confession did not comport with this idea, nor, as we understand it, the spirit of the statute, and it should have been rejected.

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During the retirement of the jury, a book containing some cotton accounts, which had been introduced in evidence, was, by agreement of defendant, sent into the jury room for their inspection. A little later the jury sent for a magnifying glass, which, over the objections of appellant, was given the jury, and appears to have been used by them in looking at the entries in the cotton book, with the view of detecting supposed alterations in the dates, which, if true, was a very material matter bearing upon appellant's *alibi*. We deem it unnecessary to enter into a discussion of the question, as it will not occur upon another trial.

Because of the admission of the confession of defendant through the witness Hawkins, the judgment is reversed, and the cause remanded.

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GREEN v. STATE.

96 Md. 384—54 Atl. Rep. 104.

Decided Jan. 21, 1903.

CONFESSIONS: \* *Competency must affirmatively appear—Method of proving them, etc.*

1. To admit a confession in evidence, it must first be proven affirmatively that it was not obtained by threats, or by promise of advantage to be derived from it.
2. Where the accused has for a while been unconscious from the effects of a wound; but was of a clear mind when he made the confession, it is admissible.
3. A witness is not incompetent to prove a confession because he fails to remember the language used by the defendant.
4. The confession in question, *held* admissible.

Appeal from the Circuit Court, Talbot County; Hon. James A. Pearce, Hon. Edwin H. Brown, and Hon. William R. Martin, Judges.

Lewis B. Green, convicted of murder, appeals. Affirmed.

Argued before McSHERRY, C. J. and FOWLER, BRISCOE, BOYD, PAGE, SCHMUCKER, and JONES, JJ.

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\*See CONFESSION in Table of Topics.



*Seth & Wilson*, for the appellant.

*Isidor Rayner*, Attorney General, for the State.

JONES, J. The appellant was indicted in the Circuit Court for Talbot County on a charge of murder, and upon trial was convicted of murder in the first degree. He received the sentence of the court on the 7th day of June, 1902, and brings this appeal from that judgment. The questions upon this appeal are presented by exceptions to evidence admitted by the trial court against objection made on his behalf.

The victim of the homicide was a woman, and the killing was done by shooting with a pistol. After using the pistol with fatal effect upon his victim, he turned the weapon upon himself, presumably with suicidal intent. He was found to have shot himself through the right ear (the bullet passing through the bone, and on down through the throat, as described by a physician who saw him), and also in the chest, over the heart (this bullet passing under the muscles and lodging under the big muscles of the arm). Immediately after the shooting, he was found to be suffering greatly from shock, and was unconscious. It was soon discovered, however, that the wounds which he thus inflicted upon himself, after their immediate effect had subsided, were not dangerous. Within two days after the shooting the appellant made certain confessions or statements to an attending physician in the presence of a justice of the peace, who took the same down, as to his having done the killing for which he was afterwards indicted and convicted, and as to his motive therefor. These confessions or statements were admitted as evidence against the appellant upon his trial by the court below, which overruled objections thereto made by his counsel, and are the subject of the exceptions brought up by the record.

The questions presented upon the exceptions are matters of grave import to the appellant, but, as respects the disposition the court must make of them, are free from difficulty. The rules of law that must determine these questions would seem to be too well settled by our own decisions to make necessary any reference to other authorities. The confessions of the accused, especially in capital cases, as this was, are always to be received with caution. The law imposes the condition upon the admit-

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ting of them in evidence that they be not induced by threats, or by promise of advantage to be derived from making them, and the burden of showing affirmatively that they were not so induced to be made in any given case is upon the prosecutor. *Nicholson v. State*, 38 Md. 140. The confession which was objected to by the prisoner's counsel, and admitted by the court, as deposed to by Wm. E. Hollyday, a justice of the peace, who took the same down, appears in the record as follows: "Feb. 6, 1902. I examined him. I asked him why he shot Carrie Price. He said: 'I shot her because she wouldn't do as I wanted her to do, and cursed me and called me a damn liar. Then I asked her to get me my things, and I would leave, and Carrie Price said I knew where my things were, and I could get them myself. That she was not going to get them. Then she left the house. I went after her, and asked her to go home, and she said she was not going home; she would go uptown and get an officer, and have some peace. Then I went to the house and got my pistol.' I asked him what did he do then. He answered: 'Carrie Price had \$12 of my money, and Lewis asked Carrie for my [his] money. Q. Did she give it to you? A. Yes, sir. Q. What did you do then? A. I fired on her two or three times—I don't know which—and once after she fell. Q. What house was Carrie at? A. Gussie Wheatley's. Q. How came you to take the pistol with you? A. I went and got it on purpose to shoot her with. Q. What did you shoot Carrie for? A. Well, I was going with her, and she would go with other men. That was the cause I shot her. Q. Was she your wife? A. No, sir; but I thought she shouldn't go with other men.' The subscriber wrote this while Lewis Green was stating it." Before offering this confession in evidence, the State questioned the witness Hollyday as follows, after proving that he was a justice of the peace, and that he went to where the prisoner was: "Q. Did he make any statement to you about the shooting? A. Yes, sir. Q. Just tell the court whether it was freely and voluntarily made on his part. A. It was. Q. Were any threats made against him, or any inducements held out to him to make a statement? A. None at all. Q. Who requested him to make a statement? A. No one at all." Then upon cross-examination



this witness was asked: "Q. Did you take this statement at his request? A. I asked him if he was willing to give a statement, and he said 'Yes,' and I asked him to give the cause of the shooting. He said he had a cause. That is the only cause he gave me. Q. Did you tell him he better tell? A. No, sir. Q. You didn't ask him to tell? A. No, sir; I told him he was not required to incriminate himself." Upon further examination by the State he said: "He did freely and voluntarily make it [the statement] himself. I was merely asking him, and he made it"—and further said that he did not offer the prisoner anything, nor promise him anything, nor tell him it would be better for him if he would confess. In all this he was confirmed in a negative way by Dr. Eckels, the attending physician, who testified to being present, and that he did not hear anything in the way of threat or inducement, and that he did not himself "tell him that he [the accused] ought to confess, or advise him to confess." It was to the admission of this confession that the first exception was taken on behalf of the accused (the appellant). There was no error in the ruling of the court upon this exception. The foundation laid by the State in its preliminary inquiries was quite sufficient to justify the admission of the confession. The confession admitted, and which action was approved by this court, in the case of *Ross v. State*, 67 Md. 286, 10 Atl. Rep. 218, was made under circumstances much more likely to subject the accused to pressure than any appearing here.

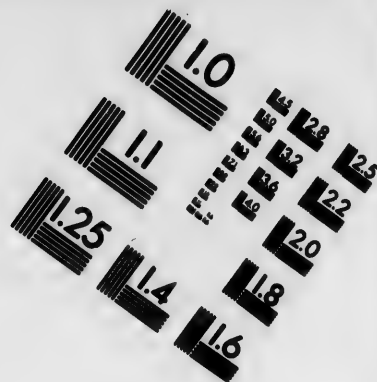
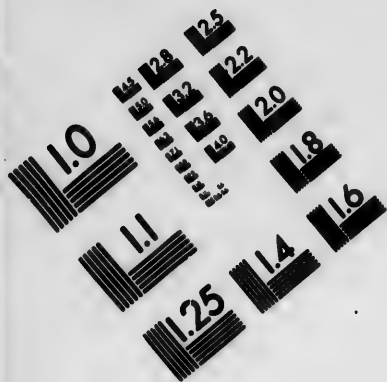
The second exception of the appellant was taken to the admission of the evidence of the witness Dawson, who testified that he was a constable; that he was present when the appellant made to the witness Hollyday the statement which has been set out in connection with the testimony of that witness; that the statement by the appellant was made voluntarily; that there were no threats made, nor "inducements or promises held out to him to make a statement;" and that he "was with Mr. Hollyday the whole time;" they "went together"—and was then asked, after being questioned on the part of the appellant as to the appellant's condition, and as to whether the appellant knew that the witness was a constable and that the witness Hollyday was a justice of the peace, and answering these two last inquiries

affirmatively in making his statement upon which the cause of the shooting was based. Eckels," of the State, in making this to be a confession, assumed existence of a physical condition. He found him to him on the 12th of February, 1902. He saw the prisoner and he had a "partial" confession. The shock, a confession of "mind was improved; man would questions before the jury from them the appellant capable of

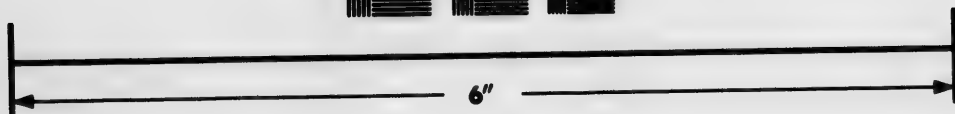
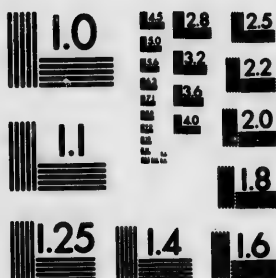
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affirmatively, to tell as near as he could what the appellant said in making his statement to the witness Hollyday. The ground upon which the objection to this testimony was put was "because of the physical and mental condition, as shown by Dr. Eckels," of the appellant at the time of the confession. Assuming this to be a legal ground of objection, if the basis of fact assumed existed, Dr. Eckels' testimony as to the mental and physical condition of the appellant was to the effect that though he found him suffering greatly from shock when he first was called to him on the day of the shooting, which was the fourth of February, 1902, and that he was then unconscious, later in the day he saw the appellant again, when his condition was improved, and he had recovered somewhat from the shock, and was "partially" conscious; that the next morning he had recovered from the shock, and was conscious; and that on the 6th, the day the confession or statement was made by him, his "condition" of "mind was all right;" that his general condition was very much improved; that he "talked very intelligently, as an intelligent man would talk in normal mind;" and that he answered all questions promptly and intelligently. With this testimony before the jury, there was no reason for withholding the statement from them on account of the physical and mental condition of the appellant at the time it was made. He was shown to be fully capable of making an intelligent statement.

The objection having been overruled and the evidence admitted, the witness testified: "Squire Hollyday asked him in regard to it. He said he shot her. He asked him what for. In the first place, he said he had a reason, or something that way. He went on and said that he couldn't live with her, and no one else should; he wouldn't let any one else. That was about the amount of it." Upon further questioning he said, in substance, that he had given all he could recollect of what was said. Asked to state the exact language of the appellant, he answered: "That is about the substance of it. I couldn't go over it word for word, for the life of me." At this point the counsel for the appellant moved the court "to strike out the testimony of this witness on the ground that he didn't state anything but the impressions as he gained them from the language, and did not give the language." The court overruled this motion, and this action of



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the court is the ground of the third and last exception of the appellant. In this the court was clearly right. It was not necessary that the witness should be able to repeat the exact language used, in order to testify. He did not give mere impressions, but gave the substance of what was said, as far as he could recollect it, and this was sufficient. *Worthington v. State*, 92 Md. 222, 48 Atl. Rep. 355, 56 L. R. A. 353, 84 Am. St. Rep. 506. A comparison of what this witness said with the statement taken down by the witness Hollyday will show that there is no divergence from that statement by the witness, in substantial effect, as far as the recollection of the witness allowed him to go.

Finding no error in any of the rulings of the court brought up by the exceptions the judgment will be affirmed. Judgment affirmed, with costs.

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#### STATE V. YOUNG.

52 La. Ann. 478—27 So. Rep. 50.

Decided Dec. 18, 1899.

**CONFESSIONS:** \* *Proof must show them to be voluntary—Degree of influence.*

The rule of law demands that the confession of an accused shall have been made voluntarily, and without the appliance of hope or fear by any other person; and that the law cannot measure the force of the influence, or decide upon its effect upon the mind of the accused, and therefore excludes the declaration if any degree of influence has been exerted. The proof must show that the making of the statement was voluntary.

(Syllabus by the Court.)

Appeal from the Judicial District Court of the Parish of St. Landry; Hon Gilbert L. Dupre, Judge.

Joseph Young was convicted of a felonious attempt to commit crime and appealed. Reversed.

*E. P. Veazie* and *J. R. Pavy*, for the appellant.

*Milton J. Cunningham*, Attorney General, and *R. Lee Garland*, District Attorney, for the State.

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WATKINS, J. The defendant was prosecuted for an attempt to commit rape upon one Alice Carriere, and on trial was, by the jury, found guilty as charged, and sentenced to imprisonment in the penitentiary for a term of five years, and from said verdict and sentence he prosecutes this appeal.

During the progress of the trial, there was but one bill of exceptions retained, and upon same the defendant relies for relief at our hands. That bill of exceptions relates to the testimony of several witnesses for the State, the testimony of which was to establish a voluntary declaration made by the accused, and the objection to which was "that such declaration was not, in fact, free and voluntary." Upon this objection testimony was taken, and reduced to writing, and same was annexed to and forms a part of said bill of exceptions; the trial judge entertaining the opinion that the testimony was admissible, and that said declaration was free and voluntary. We have made from the record the following extracts from the testimony of witnesses:

Wiltz O'Quin, sworn, says: "Q. When you got home, where did you see the accused party? A. After I got home, they brought him to my gate. Q. Who brought him to your gate? A. Dan Gibbs, the uncle of the girl named in the information. Q. Who else were with him? A. I don't know. I did not pay any attention. There were two or three of them following. Q. Were they making any demonstration as if to harm him? A. No, sir. Q. How did they have him tied? A. They had a plow line around his neck. Q. Did any one say in your presence that they intended to do him bodily harm? A. No, sir. Q. Were his hands tied? A. No, sir. Q. How many men had a hold of the rope? A. Only one. Q. Was he excited? No, sir. Q. When you spoke to him, had you told him anything to frighten him, or induce him to make a statement? A. No, sir. Q. What was it you said to him, and what was it he told you? A. Dan Gibbs, the fellow who had him around the neck, was telling me what he had done—his having tried to ravish this little girl. I asked him, 'Joe, what in the world did you mean?' and he said he did not know. I asked him if he tried to do it to this little girl, and he said he did; that he tried to do it to her without hurting her, and, when he found out he was hurting her, he left her alone. I said no more to him. Then we carried

him down to the bridge, to see what would be done with him. . . . Q. What was the object in bringing the defendant to the bridge? A. To meet Mr. Prosser, and to decide what to do with him. Q. What was the discussion about what you should do with him? A. Whether to carry him to the law, or give him a brushing, and send him back to work, or to run him out of the country. Q. What do you mean by a brushing? A. Give him a whipping. Q. Was it not on the advise of Mr. Lesseps that you did not hang him or whip him? A. No, sir; we would not have hung him, but we would have whipped him. We would have let the mob of negroes hang him, and would not have protected the prisoner, but would have protected those who hung him, as we thought he deserved it. Q. Did Mr. Lesseps at length come up, and say to the crowd, 'It is better to let the law take its course?' A. Yes. We went for Mr. Lesseps, and he came up, and said it was better for the law to take its course; but the prisoner wanted us to whip him and turn him loose. Q. Was the rope still around his neck? A. No, sir; not on the bridge. He was turned loose. The negro who had the rope was just leading him around. That is all the rope was tied on him for. He had no pistol or nothing. Q. Was the rope taken off his neck after it was decided not to hang him, and let the law take its course? A. No, sir. As well as I can recollect, the rope was taken off before Mr. Lesseps came; in other words, it was taken off as soon as Mr. Prosser came and met me on the bridge. . . . Q. A considerable crowd of negroes had accumulated before Mr. Lesseps got there, had there not? A. A good many; yes, sir. Q. Did not this crowd of negroes who had assembled there want to hang Joe? A. No, sir. . . . Q. How long did it take the crowd you were in to decide the question whether the negro was to be hanged, whipped, or sent to the court house? A. I don't know, sir; only a short time. Q. It never was decided, was it, until Mr. Lesseps reached the scene? A. No, sir. Q. When Mr. Lesseps said to the crowd that he thought it was better to let the law take its course, then it was that it was finally agreed to turn him over to the law, was it not? A. Yes, sir. Q. Was there any talk of whipping, or lynching, or sending him to the court house, before the accused party told you how this thing happened? A. No, sir. It all took place after.

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Q. Did you make him any threats or inducement before or at the time he told you how it happened? A. No, sir. Q. Was there any crowd gathered around him, or near him, at the time he told you? A. No, sir. By the court: Q. As I understand it, where this conversation took place the negro had a plow line around his neck, but no evidence of violence had been offered him. Now, had you said anything, or had anybody else done anything calculated to frighten him? A. No, sir. Q. The plow line had been put around his neck to keep him from running off? A. Yes, sir; that is the only way they had to stop him. Q. And the statement by him made to you was voluntarily made, and not superinduced by fear, nor threats on your part? A. Yes, sir."

The following is an extract from the interrogation of another witness: "Q. Do you know how the rope and why the rope was put around the prisoner's neck? A. As to how it was put around, I don't know; but the reason why—I had turned him over to a man I had working in the yard on some wagon bodies, and merely tied the rope to make him secure. He tied the rope around his neck, and I tied him to the wagon where he was working. That was early in the forenoon, and he remained there until late in the afternoon. Mr. O'Quin returned home then, and I merely sent him over to Mr. O'Quin. Q. Did you turn him over to a mob or crowd? A. No, sir; only to one man, who gave him to another man to bring him to Mr. O'Quin. No mob went from my place to Mr. O'Quin's place with him. There was no mob there. There might have been two or three colored men who went with him. No white man went; not even myself. Q. Did you take part in the discussion of the question as to what disposition should be made of the prisoner; that is to say, whether he was to be hanged, whipped, or turned over to the law? A. Yes. Before Mr. Lesseps came up, Mr. O'Quin and I had a conversation on the subject, and we decided to give him a whipping, and turn him loose; the defendant declaring that he would rather be whipped than sent to law."

The following is an extract from the interrogation of another witness: Q. Have you given your statement orally to the judge in this matter? A. Yes, sir. About five in the evening a darkey came to me, and said that Mr. O'Quin and Mr. Prosser asked



me to come up to the bridge. I went, and when I arrived I saw a crowd of negroes standing around, and Mr. O'Quin and Mr. Prosser and a few other white gentlemen sitting on the railing of the bridge. Near by us was the accused. Mr. O'Quin related the facts in the matter to me, and asked me what I thought would better be done with him. I asked the darkey if it was a fact that he had attempted to rape the little girl, and he said it was. . . . After hearing the negro's reply, I advised that he should be turned over to the law. He was then taken to a house about a hundred yards from the bridge, and was chained to a post in the house, and put in charge of two darkies to await the arrival of the constable. This was about eight o'clock in the evening. . . . Q. Do you think, Mr. Lesseps, while these discussions were going on whether it was better to hang him, to whip him, or to turn him over to the law, that the situation of the prisoner was very perplexing and embarrassing to him, and would not have been to you had you been in his fix? A. No, sir; because when I arrived on the spot there was no discussion of what should be done. Q. When you heard the question put in the crowd, 'What shall we do with the man?' did not that put him in a very embarrassing and perplexing condition? A. Yes, sir; if he was guilty. If he was innocent, no. Q. Were the people assembled there friends of the prisoner or not? A. He is a stranger in the parish, and the only friend among the white people he might have had was Mr. Prosser, his employer; and he may have had some colored friends."

The foregoing is a reproduction of all the salient portions of the testimony, and a careful consideration thereof has brought us to the conclusion that the confession of the accused was not voluntary, but made under circumstances well calculated to inspire fear, and, consequently, same should not have been received, and that the trial judge committed reversible error in permitting it to go to the jury. The general rule of law, as stated by Greenleaf, is "that the confession shall have been made voluntarily, without the appliance of hope or fear, or by any other person." 1 Greenl. Ev., § 219. It is stated by another author that the confession "must not be obtained by the exertion of any improper influence." 3 Russ. Crimes, p. 478. The

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same theory is entertained by other authors. Whart. Cr. Ev., § 673; 2 Tayl. Ev., § 8722. "The law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted." 3 Russ. Crimes, p. 478. In *State v. Berry*, 50 La. Ann. 1309, 24 South. Rep. 329, this court held that, before what purports to be the confession of an accused person can be introduced in evidence against him, it should be shown to have been freely and voluntarily made, and not brought about by any fear on his part, or inducements held out to him; that confessions made by prisoners to parties arresting them or holding them in custody should be closely scrutinized, in order to ascertain that instrumentalities intended merely for the vindication of the law should not be converted into engines of oppression and wrong. In *State v. Auguste*, 50 La. Ann. 488, 23 South. Rep. 612, we held that the rule of law requires that the confession of an accused person shall have been made voluntarily, and without the appliance of hope, menace, or fear by any other person; and that whether it was so made or not is to be determined upon due consideration of the circumstances under which it was made; that, in order that such confession be admissible, it must appear that "the making of the statement was voluntary." In *State v. Albert*, 50 La. Ann. 481, 23 South. Rep. 609, it was held that a confession obtained under duress is altogether inadmissible as evidence against an accused person, and that testimony thus obtained should not be admitted in evidence against an accused. The facts of the instant case, as we have recited them, make it almost an exact parallel with that of *State v. Albert*. *State v. Revells*, 34 La. Ann. 381. The accused made the alleged confession to a party of private individuals—not officers of the law, or persons authorized to make arrests—who had him in close custody, with a rope around his neck, and under circumstances of intimidation and probable violence. Just prior to the confession the party had under discussion the question of whether he should be hung, or whipped, or surrendered to the officers of the law; and this discussion occurred in the presence of the accused. And when the decision was reached that the accused should be surrendered to the officers of the law he was taken to

a house about 100 yards from the bridge, where the discussion took place, and was chained to a post in the house, and put in charge of two darkies to await the arrival of the constable. In our opinion, argument is unnecessary to demonstrate that the confession was made under the appliance of fear, and that it should have been excluded from consideration by the jury. In *State v. Albert* we said: "The whole course of proceeding as it is developed in the testimony was altogether irregular, to phrase it as mildly as the circumstances will allow, and contrary to the usual course of justice;" and much the same may be said of the testimony in this case. We are clearly of the opinion that the testimony was extorted through fear and intimidation, and should not have been admitted as evidence against the accused. The ruling of the trial judge was reversible error, and the verdict and sentence must be reversed, and set aside. It is therefore ordered and decreed that the verdict of the jury and the sentence thereon based be annulled and reversed, and it is further ordered and decreed that the cause be remanded to the court below for trial according to law.

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### STATE V. FORCE.

— Neb. — 95 N. W. Rep. 42.

Decided May 20, 1903.

**CONFESSIONS:** \* *Inadmissible unless proven to be competent—When subsequent confession is admissible.*

1. In a criminal prosecution, only such confessions of the defendant as are shown to have been made voluntarily, without fear of punishment or hope of reward, are admissible in evidence.
2. The father of the accused, shortly after the commission of the alleged crime, pointed a shotgun at his head, and said: "James, you are my prisoner. I have a right to arrest you. You shall go to Harrison and tell the sheriff, county attorney, and coroner's jury all about the killing of H. R., and you will get clear; but, if you don't, you will get convicted." Accused consented to the demand of his father, and made a confession to the officers named. *Held*, that evidence of such confession was inadmissible.

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\*See CONFESSION in Table of Topics.

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3. Further confessions by the accused, subsequent to such extorted confession, will be equally inadmissible, if so related in point of surrounding circumstances and proximity of time as to raise a presumption that the influences resulting in the first confession have not ceased to operate upon his mind.
4. Evidence examined and held that certain subsequent confessions were surrounded by such circumstances, and removed from the influences leading to the first confession by such a lapse of time, as to raise a presumption that they were voluntary, and therefore admissible against accused.  
(Syllabus by the Court.)

Error to the District Court, Dawes County; Hon Harrington, Judge.

James Force was indicted for murder, and, being acquitted, the State brings exception. Exception sustained.

Commissioners' Opinion. Department No. 1.

*M. C. O'Connell, A. W. Crites, and W. H. Fanning, for the State.*

*F. G. Hamer, for the defendant in error.*

KIRKPATRICK, C. This is an error proceeding prosecuted by the county attorney of Sioux County, under the provisions of sections 515, 516, and 517 of the Code of Criminal Procedure, from a judgment of the District Court of that county directing the acquittal of James Force, charged with the murder of one Harvey Russell on June 16, 1901. The trial was had on December 5, 1901. Very little material or competent evidence was offered and received by the trial court, and, upon the evidence received, the jury would hardly have been justified in finding the defendant guilty. The peremptory instruction of the trial court was therefore right, and the only question requiring consideration is whether the trial court erred in excluding certain evidence offered by the prosecution tending to establish the guilt of the accused. This evidence relates to alleged confessions and statements made by the defendant, which it was contended on the part of the defense were not voluntarily made, and were therefore inadmissible.

It is disclosed that Harvey Russell was found dead on June 16, 1901, having been shot with a rifle once through the head and once through the body, and had also sustained a slight flesh

wound in the abdomen. Either of the first-mentioned wounds would necessarily have proved fatal. It is disclosed that James Force came to his home, the residence of his father and mother, some time in the forenoon of June 16th; his parents both being in the house at that time. A younger brother of the defendant, as well as a hired hand, seem to have been outside, caring for the horses. It seems that the defendant made some statement to his mother, who thereupon said to her husband, Franklin Force, "James has shot Harvey Russell." While testimony regarding these facts was being received, the jury were excused from the court room, and the mother, whose name for some unknown reason was not indorsed upon the information, was called as a witness by the defense for the purpose of showing that the alleged confession which was about to be offered was not voluntary; and what transpired at the time may best be shown by her testimony, as follows: "You remember June 16th, about 10 o'clock in the forenoon? A. Yes, sir. Q. Were you in your kitchen about that time? A. Yes, sir. Q. Who was with you there? A. James. Q. Your son? A. Yes, sir. Q. Where was his father, Franklin Force, at that time? A. In an adjoining room. Q. Did anybody go into the room where Mr. Force was? A. I stepped to the door. Q. What did you say to Franklin Force? A. I said, 'James has shot Harvey Russell.' Q. What did Mr. Force then do? A. He came out. Q. Where was Frank Houston at that time? A. Well, he went out and ordered Frank to get the team. Q. Did Frank go and get the team? A. Yes, sir. Q. Then what did Mr. Force say to James? A. He said: 'James, you will have to go to Harrison and tell the sheriff, county attorney, and coroner's jury all about the killing of Harvey Russell. If you do, you may get clear, and if you don't, you may be convicted.' Q. State anything more he said there that you remember. A. James said, 'I don't want to go, Pa, till I have an attorney.' Q. Did he mention any attorney that he wanted to get? A. Attorney Harrington. Q. What did he say about that? What did James say, if anything further? A. He said he wanted Attorney Harrington. Q. Before he said or did anything? A. Yes, sir; before he said or did anything. . . . Q. Now, then, what did his father say when his son said that he did not want to tell anything or do anything until he got his at-

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torney? A. He stepped aside to a room and picked up a shotgun and said: 'James, you are my prisoner. I have a right to arrest you. You shall go to Harrison, and tell the sheriff, county attorney, and coroner's jury all about the killing of Harvey Russell, and you will get clear; but, if you don't, you will be convicted.' Q. What did James say? A. He said, "Well, Pa, I will go then."

The father and mother and the defendant, who was then about twenty years of age, got into the wagon and went to Harrison, where the defendant gave himself up to the sheriff; and the sheriff, acting as coroner, summoned a jury, and, with the defendant, the county attorney, and members of the coroner's jury, repaired to the place where the homicide was committed. The father and one or two other persons were also present at the place where the body was found. After examining the body and the surrounding ground, the jury were sworn, as also was the defendant, who thereupon told his story to the jury, which was taken down in writing by one of the members thereof. The prosecution sought to show the statements made by defendant on this occasion at the scene of the homicide, as to the manner in which the difficulty arose and the killing occurred. This was objected to by the defense on the ground that defendant had been coerced by his father to make the confession, and that he had been under restraint and duress, and also that the statement of his father to him that he would be acquitted if he told the whole story was such an inducement as rendered the whole confession incompetent. It was shown that no threats were made against him by any of the persons present at this meeting, and that no promise or hope of reward was held out, other than that coming from his father, as disclosed in the testimony of the mother already quoted.

"The rule is well settled that a promise of benefit or favor, or a threat or intimation of disfavor, connected with the subject of the charge, held out by a person having authority in the matter, will be sufficient to exclude a confession made in consequence of such intimation, either of hope or fear." *Heldt v. State*, 20 Neb. 492, 30 N. W. Rep. 626, 57 Am. Rep. 835; *Furst v. State*, 31 Neb. 403, 47 N. W. Rep. 1116. Measured by this rule, we are satisfied that the testimony of defendant



given at the coroner's inquest, and the statements and explanations made by him at that time to the members of the coroner's jury, the sheriff, and county attorney, were not voluntary statements, within the meaning of the rule. If the trial court believed the testimony of Mrs. Force, given regarding the transaction, which we assume it did, then the confessions and statements were not such as were properly admissible against the accused. It is quite clear that, had the defendant been left to his own volition, he would not have gone to Harrison and delivered himself up to the sheriff — at least, not until he had counsel; and it is equally clear that he would not have given his testimony before the coroner's jury. While the father was not, probably, strictly a person in authority, within the rule recognized in most of the cases, yet it should be remarked that the defendant was a minor residing at the home of his parents, and his father exercising parental authority over him, for which reason we think the case comes reasonably within the rule. It follows, therefore, that the ruling of the trial court in excluding the evidence regarding the confessions of defendant under these circumstances, and his statements made to the officers and members of the coroner's jury, is correct, and should be sustained.

It appears that the names of the mother and the younger brother of defendant, Frank Houston, all of whom doubtless heard the conversation, were not indorsed on the information; the reason of the failure of the prosecution so to indorse these names not appearing anywhere in the record. The testimony of these witnesses would manifestly have been material. It is further disclosed that from the time of the homicide until the trial, almost six months, the defendant was in the custody of one Ernest Lyons, who was acting as jailer, and who had also been a member of the coroner's jury. It seems that, some time during the six months intervening between the homicide and the trial, the defendant, who took his meals with the jailer at the latter's residence, made certain statements to the jailer, and the prosecution sought to show these statements by calling him as a witness. His testimony was objected to on the ground that he had been a member of the coroner's jury, and had heard the involuntary statements and confessions of defendant, wherefore

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the defendant would, as a matter of course, tell the same story that he had previously told—the duress of the father which had extorted the first confession still existing—and that the jailer's testimony, therefore, would not be received. Lyons testified as follows: "How long have you known him [meaning the defendant]? A. I saw him first on the 16th day of June. Q. Have you known him since then? A. Yes, sir. Q. I will ask you whether since that time, during the whole or any part of the period, he has boarded at your house? A. Yes, sir. Q. Did you, since that time, and while he was boarding there, have any conversation with him in reference to the killing of Harvey Russell, of which he stands charged? A. Not but very little. Q. Did he make any statement to you at any time since as to the manner of the killing of the deceased, Harvey Russell?" To this an objection was interposed, and upon cross-examination it was shown that this witness had been a member of the coroner's jury, and had been acting as jailer, having the defendant in charge. Among other interrogatories put to this witness were the following: "Did you make any promise of immunity or advantage, or any threats of what would be done, to induce him to make such statement? A. I did not. Q. Now, you may go on and state what he said to you, where it was, and when it was, in relation to the killing of Harvey Russell?" Objection was interposed to this question in the following words: "The defendant objects as incompetent, irrelevant, and immaterial, and because the witness was one of the coroner's jury, and, furthermore, that the defendant was at this time in the custody of the sheriff, through his jailer, and any statement made to him is the same, in law, as if made to the sheriff, and that said statements were not voluntary." This objection was sustained. The prosecution thereupon made the following offer: "The State offers to prove by this witness that at the residence of the witness, while the accused was in the presence of the witness and his wife, the accused said, among other things, that he met Harvey Russell out there on that day; that they had some words together; that the accused pulled up his gun and fired three shots at the deceased, by which he came to his death, the last of which shots was fired as he lay at or near the bottom of a ravine, already testified to by other witnesses,



and after having been dragged by his horse by the stirrup some thirty feet or more. These are a part of the things which we have to prove by this witness, by his answer to this question and other succeeding questions." The same objection was interposed to this offer as quoted above, and in addition "that the statements, if so made, were made under the threats and promises and inducements heretofore held out, and not withdrawn." The objection to the offer was sustained, and the offer denied. It appears that, about a week before the trial, counsel for the defendant asked to have the sheriff take the defendant and go out with them to the scene of the homicide. As court was not in session at that time, and it being impossible to get an order from the court for the purpose indicated, counsel for defendant notified the county attorney of his desire; and the latter assented thereto, but said that he would go along with them. Accordingly, two of the counsel for defendant, the county attorney, the sheriff, the jailer, and one or more members of the coroner's jury, who seem to have gone with the party as drivers of the teams, went out to the scene of the homicide, and went over the ground, made measurements, etc.; and there the defendant seems, in answer to questions of his counsel and other members of the party, to have made certain statements regarding the way the killing occurred.

Godson Lacey was called by the State, and interrogated as follows: "Q. You may state all that was said and done on that occasion, last Friday, between the parties who were there present, including the defendant, his counsel, M. F. Harrington, and Grant Guthrie, the sheriff, county attorney, Mr. Patterson, Mr. Elmer Smith, and yourself?" This question was objected to by the defense for four reasons, in substance as follows: (1) That anything the defendant said or did was in the presence of the sheriff, two members of the coroner's jury, and the county attorney, and would naturally be repetitions of the alleged confessions; (2) that, under the testimony of the county attorney, any statement made or act performed was to be heard by him or performed in his presence or in the presence of the sheriff, both of whom had heard the alleged confessions; (3) that any statement made by counsel for defendant cannot be binding upon the defendant, or prejudicial to him; (4) that the mat-

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ters sought to be introduced are incompetent, irrelevant, immaterial, and prejudicial to defendant. This objection was sustained, and the prosecution then made an offer as follows: "The State here offers to prove by this witness now on the stand, and by this question and other succeeding questions, the following facts; being the same that we offered to prove by the witness Lowry, which are as follows: That one week ago to-morrow this witness went out to view the scene of the homicide at the request of counsel for defendant; that defendant went along in custody of one Patterson; that M. F. Harrington, the counsel for accused, went along; that Grant Lowry, another counsel for the accused, went along; that defendant's father was absent; that the sheriff, county attorney, Elmer Smith, and Patterson were there together; that M. F. Harrington asked this witness to ask defendant if he saw Harvey Russell have a gun on that day (referring to the day and occasion of the homicide), to which the defendant, in the presence and hearing of all the parties, [said] that he did not; that said Harrington, in the presence of these persons, asked him the further question whether he saw anything drop, to which the defendant replied in the presence and hearing of all these parties that he believed he did; that the defendant pointed out voluntarily the place where the shells already produced in evidence were found; and that then he moved about the place pointed out and said, 'I might have stood about here;' that some one of the parties then, in the presence and hearing of all, asked how far the gun would throw empty shells, referring to the gun used by the defendant on the occasion of the homicide, and that C. W. Patterson, in whose custody the defendant then was, said that 'the gun is here;' that the defendant then went up to the wagon, got out the gun, and brought it down and handed it to M. J. O'Connell, and who went down into a canon, who discharged a loaded cartridge which was then in the gun, brought the gun back, and handed it to the accused, who stood on a bank near the place where the shells were found, above the place where he said he might have stood on the occasion of the homicide; that he then ejected the shells once for the purpose of ascertaining how far the gun would throw an empty shell, and then handed the gun back to the county attorney, who himself ejected the empty shell at

least twice for the purpose of ascertaining how far it would throw an empty shell—all of which was done, as stated, for the purpose of determining where the accused stood when he fired the fatal shot, or the two fatal shots; that everything that was there said and done, was said and done without any promise, threat, inducement, promise of reward or advantage of any kind whatever by this witness or the county attorney, or by any other person in authority, except his own counsel, as above stated." To this offer counsel for defendant interposed an objection substantially the same as that above quoted, which was sustained, and the offer denied. Some other testimony was offered by the prosecution from other persons who were present and heard the same conversation, all of which was ruled out on objection.

The theory of the trial court seems to have been that the first statement made by the defendant before the coroner's jury was incompetent because made under a threat and promise made and held out by the father of the accused, and that the statement made by the accused to the jailer in the home of the latter, and the statements and actions of the defendant about a week before the trial as already mentioned, were all incompetent, to the same extent, upon the presumption that, if the defendant made an involuntary confession before the coroner's jury, any conversation which he had or statements by him made at any other time, when any member of the coroner's jury, or any person who heard the first confession, was present, undoubtedly be a repetition of the first confession, and therefore tainted with the same infirmities. In this we are of the opinion that the trial court was in error. It is shown that nearly six months had elapsed since defendant had made the alleged confession before the coroner's jury before he made the statements and pointed out the situation at the scene of the homicide, which was a week before the trial. Although the exact length of time between the coroner's inquest and his alleged statements to the jailer is not disclosed by the record, we are of opinion that the evidence offered by the State as to each of these occasions was admissible. The only theory upon which the evidence given at the coroner's inquest could be excluded was that defendant had been coerced or induced by his father to make the statements, and that he had been called upon by

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the county attorney or coroner's jury to testify, and had done so, perhaps, without being cautioned as to his rights in the premises. The time, however, elapsing between the confession to the coroner's jury and the statements to the jailer, and the visit to the scene of the homicide, is so great as to raise a presumption that he was no longer under the influence of the coercion exercised or inducements held out by his father, resulting in the first confession. The authorities draw a clear distinction between confessions of guilt, which are only admitted when made voluntarily, and the statements as to facts and circumstances which might tend to establish the guilt of the defendant. *Taylor v. State*, 37 Neb. 788, 56 N. W. Rep. 623; *People v. Strong*, 30 Cal. 151; *People v. Parton*, 49 Cal. 632.

But whether the statements made by the defendant to the jailer, and his statements and actions later at the scene of the homicide, are regarded as confessions or not, they were clearly admissible in evidence. The rule seems to be well settled, and practically recognized by all the authorities, that, where the confession offered in evidence was made at a sufficient length of time after the involuntary confession to raise a presumption that it was in no way influenced by the involuntary confession, then it is admissible in evidence. *Taylor v. State*, 37 Neb. 788, 56 N. W. Rep. 623; *Commonwealth v. Myers* (Mass.), 36 N. E. Rep. 481; *State v. Fisher*, 6 Jones, Law, 478; *Reeves v. State* (Tex. Cr. App.), 24 S. W. Rep. 518; *State v. Howard*, 17 N. H. 171; *State v. Henry*, 65 Tenn. 539.

From what has been said, it follows that the trial court erred in excluding the evidence offered by the prosecution regarding the statements made by the defendant at the scene of the homicide shortly before the trial, as well as to the statements to the jailer while in custody. The exceptions by the prosecution are well taken, and it is recommended that they be sustained.

HASTINGS, C., concurs.

PER CURIAM. For the reasons stated in the foregoing opinion, the exceptions taken by the prosecution in this case to the rulings of the trial court excluding certain evidence are sustained.

## WHITNEY V. COMMONWEALTH.

24 Ky. Law Rep. 2524—74 S. W. Rep. 257.

Decided May 20, 1903.

CONFESSIONS:\* *Proof of other offenses—Confession must be free and voluntary—The facts brought to light by, and corroboration of confessions—Defendant's testimony—Remarks by prosecuting attorney.*

1. The evidence showing that the murder charged was committed in the perpetration of a burglary, proof of other burglaries by defendant and another, immediately before the crime in question, are held admissible to prove intent and to identify the party.
2. A confession is not admissible, unless the evidence shows that it was freely and voluntarily made.
3. A written confession being made by the accused, while under arrest, to a detective who said to him: "Earl, it looks like they have a strong case against you. You are in bad. The truth won't hurt"—was admitted. *Held*, that notwithstanding the care taken by the judge at the trial, in requiring all parties hearing the confession to testify in the preliminary inquiry, the court would be inclined to hold the confession inadmissible, were it not for the fact, the accused substantially testified to the same facts as stated in the confession, from the witness stand.
4. Facts brought to light by a confession, and so much of a confession as is corroborated by the facts, are admissible.
5. A prosecuting attorney in his argument to the jury said that "the defendant was forced to admit on cross-examination that on the way from Louisville to Lexington he was trying his pistol, to see whether it would work, as a preparation for what he intended to do, and what he did do, when he came to Lexington." Upon objection of the defense the court excluded the remarks and admonished the jury to ignore it, whereupon the prosecuting attorney said that he did not mean it as a statement of fact but as an inference of his own. *Held*, no prejudicial error.

Appeal from the Circuit Court, Fayette County.

Earl Whitney, convicted of murder, appeals. Affirmed.

*B. T. Southgate* and *Charles Kerr*, for the appellant.

*C. J. Pratt* and *M. R. Todd*, for the appellee.

SETTLE, J. The appellant, Earl Whitney, together with Claude O'Brien, was indicted, tried, and convicted in the Fayette Circuit Court for the murder of A. B. Chinn, a Lexington

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merchant. His trial was separate from that of his alleged accomplice, O'Brien, and his plea, like that of the latter, was "Not guilty;" but by the verdict of the jury his punishment was fixed, as was that of O'Brien, at death. From the judgment of conviction, and the refusal of the lower court to grant him a new trial, he prosecutes this appeal.

It is not deemed necessary to here enter upon a recital of the facts and circumstances connected with the revolting crime of which he, as one of the perpetrators, stands convicted, as they are minutely set forth and exhaustively discussed in the opinion of this court in the case against Claude O'Brien (*O'Brien v. Commonwealth*, — Ky. —, 24 Ky. Law Rep. 2511, 74 S. W. Rep. 666), this day handed down, to which opinion reference is here made. It is sufficient to say that the evidence heard upon the trial of appellant shows beyond doubt that A. B. Chinn was foully assassinated in his bedroom on the morning of October 11, 1902, while it was yet dark, by a pistol shot received at the hands of either the appellant, Earl Whitney, or his accomplice, Claude O'Brien, both of whom were present at the time, armed with pistols; having shortly theretofore entered the dwelling house of Chinn upon a mission of theft and robbery. The only question of doubt in the case is as to which of the accused fired the shot that killed Chinn. The only persons able to name the one by whom the fatal shot was fired are Whitney and O'Brien, each of whom claims that it was done by the other. But be that as it may, both are, under the evidence, guilty, because they were accomplices, each aiding and abetting the other in the assassination, as in the lawless enterprise which led to the act. O'Brien, though introduced by appellant's counsel in this case, refused to testify; but proof of a conversation that occurred between him and appellant after the latter's confession to the officers was made in this case, which did not differ materially from the testimony given by O'Brien upon his own trial.

It is contended by counsel for appellant that the judgment of conviction should be reversed for the reasons, first, that it was error to admit upon the trial evidence of the burglary of the houses of Slade and Mrs. McConathy; second, to admit as evidence the confessions of appellant; third, to allow the Com-



monwealth's attorney to make certain alleged statements in argument which were not supported by evidence.

The question raised by the first of the foregoing grounds we have already decided in the case of *Claude O'Brien v. Commonwealth*, *supra*, which decision is against the contention of appellant's counsel, and we are still of opinion that it was competent to admit proof of the burglaries committed by appellant and O'Brien just previous to the homicide, first, as showing the motive with which they entered the house of Chinn; and, second, for the purpose of identifying the parties who committed the previous burglaries as the slayers of Chinn. In this case, as in that of O'Brien, the trial judge carefully instructed the jury that evidence of the burglaries committed by the appellant and O'Brien before entering the house of Chinn could be considered by them only for the purpose of showing the motive with which they entered the Chinn residence, and should not be considered for any other purpose.

We are likewise of the opinion that no error was committed by the lower court in admitting the confession of appellant. It is shown by the evidence that one Irvine, a Nashville detective, who seems to have known appellant in Nashville, interviewed him after his arrest, and, among other things, said to him: "Earl, it looks like they have a strong case against you. You are in bad. The truth won't hurt"—and that, as a result of these statements, appellant expressed his willingness to make a confession, which he did after others had been called in by Irvine to hear it.

The confession was made in the presence of four persons—one a stenographer. It was reduced to writing and signed by appellant, and this written confession was read upon the trial; it being admitted by counsel for appellant that those who heard the confession would testify that it was made as contained in the writing.

A confession of the accused out of court is competent evidence against him, although it may have been procured by deception, but is incompetent if procured by promises, threats, or advice of the prosecutor, or officer having him in charge, or of one having him in duress, or having authority over him; and as said in Roberson's *Kentucky Criminal Law & Procedure*, § 962:

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"Before the confessions of one charged with the crime are admissible in evidence against him, it must be shown that such confessions are freely and voluntarily made. It is the province of the court to determine whether they were so made, and as to their admissibility. As the facts and circumstances attending each confession are different, no rule can be stated as to just what will render the confession voluntary." It appears from the record that the trial judge, before permitting the introduction of proof of the confession made by appellant, instituted a critical investigation of the circumstances attending the making of the confession, causing those present at the time to testify with reference thereto, with the result that it was declared admissible and was permitted to be proved. Notwithstanding the great care exercised by the lower court in inquiring into the circumstances under which the confession was made by appellant, we would be inclined to declare it inadmissible but for the fact that it was, in substance, repeated by appellant when introduced as a witness in his own behalf upon the trial of this case, and also in testifying as a witness upon the trial of O'Brien. "Although an original confession may have been obtained by improper means, yet subsequent confessions of the same or like facts may be admitted if the court believes from the length of time intervening, or from proper warning of the consequences of confession, or from other circumstances, that the delusion, hopes, or fears under which the original confession was obtained were entirely dispelled." *Laughlin v. Commonwealth* (Ky.), 37 S. W. Rep. 590.

It appears that the testimony of appellant as a witness in this case and that of O'Brien was given several days after his written confession was made, and, if the confession was superinduced by improper influences, they ought to have been, and perhaps were, dispelled by the solemn realities of the trial, and the sanctity of the oath which the appellant took upon entering the witness box.

But if it were clear to our minds that the confession resulted from improper influences, its exclusion as a whole is forbidden in this case by a well-known rule of law: "Although confessions improperly obtained are inadmissible, yet any facts which are brought to light in consequence of such confessions, and so much



of the confession as is corroborated by these facts, may be received in evidence." 2 Roberson's Criminal Law & Procedure, § 960; *Jackson v. Commonwealth* (Ky.), 38 S. W. Rep. 422, 1091; *Jane v. Commonwealth*, 2 Metc. 31; *Rector v. Commonwealth*, 80 Ky. 468. Applying that rule to the evidence in this case, we find the following facts were brought to light by the confession of appellant: The finding and subsequent identification of the pistols, with one of which A. B. Chinn was killed; the consequent proof of the motive with which Chinn's house was entered; the identity of the persons who committed the theft of the pistols with the persons who committed the homicide. The statement in the confessions and the statement of appellant upon the trial as to the position of Asa Chinn during the pistol-firing in the Chinn house—that is, that he was in a stooping or kneeling position—is corroborated by Chinn. Indeed, practically the only statement contained in the confession that is uncorroborated is the one that O'Brien, and not appellant, fired the shot that killed A. B. Chinn. Not only is that statement uncorroborated, but in the evidence introduced by the Commonwealth, upon the trial, of the conversation between appellant and O'Brien which occurred shortly before the trial, we find that each accused the other of the murder of Chinn. The jury, however, found from the evidence, as they were authorized to do, that they were accomplices, aiders, and abettors, and therefore equally guilty, whether the shot was fired by the one or the other; and the evidence conduces to show that both were firing their pistols in the room where the homicide occurred, and that each of them had a pistol in addition to the probably worthless one that appellant carried with him to Lexington. The jury were doubtless unwilling to accept the statement of appellant that O'Brien, his junior in age, and, according to the evidence, also his junior in crime, was the leader and instigator of the thefts and murder of which both stood convicted.

It is complained that the Commonwealth's attorney, in argument to the jury, said that "the defendant was forced to admit upon cross-examination that on the way from Louisville to Lexington he was trying his pistol, to see whether it would work, as a preparation for what he intended to do, and what he did

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do, when he came to Lexington." After this statement was made, and objection entered, the court properly excluded the statement and admonished the jury not to consider the remark, whereupon the Commonwealth's attorney then said to the jury that he did not mean to make the statement that appellant was trying his pistol as a preparation for what he intended to do as the assertion of a fact, but as an inference of his own. There was evidence to show that appellant tried to fire his pistol on the road to Lexington, but failed. It is hardly possible that this statement of the attorney could in any way have been prejudicial to the appellant, even if the court had permitted it to stand. It certainly could not been so in view of the admonition of the court. In *Handly v. Commonwealth* (Ky.), 24 S. W. Rep. 609, this court held: "While certain statements made by the attorney for the Commonwealth on his argument to the jury were improper, because not warranted by the evidence, the appellant was not prejudiced thereby; the court having admonished the jury that such statement could not be considered as evidence in the case."

A careful examination of the record in this case fails to disclose any errors whereby the substantial rights of the appellant have been prejudiced. The instructions meet our approval, and the verdict of the jury is, in our opinion, sustained by the evidence. The judgment is therefore affirmed.

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STATE v. CROSS.

72 Conn. 722—46 Atl. Rep. 348.

Decided May 31, 1900.

CONFESSIONS:\* HOMICIDE: *Reasonable discretion of trial court in admitting confession—Duty of jailor to keep a prisoner secure; but to permit him to confer with counsel—Homicide in the perpetration of rape is murder in the first degree—Insanity—Opinions of witnesses—Examination of jurors.*

1. After a full hearing on a preliminary inquiry, as to the competency of the confession, the trial court may exercise a reasonable discretion as to submitting the confession to the jury.

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\*See CONFESSION in Table of Topics.

3. In this case, the preliminary inquiry was had in the absence of the jury; witnesses on both sides were heard. The reviewing court holds that although under the evidence, the trial court would have been justified in rejecting the confession, yet its action being within the range of reasonable discretion, its decision should not be disturbed.
3. As a general rule, a bald admission of guilt resulting from conversations with detectives or officers in charge of the prisoner, does not of itself clearly indicate that it is not made by an innocent person.
4. "A prisoner before trial is in the custody of the law for safe keeping. The sheriff is responsible for that, and may regulate and limit access of outsiders, so far as may be necessary, under the circumstances of each case, to the security of his prisoner, and the proper management of the jail; but he should, at reasonable times, and under reasonable conditions, permit the free access of counsel to his client, and this duty may be enforced."
5. Both at common law and by the statutes of Connecticut murder committed in the perpetration of rape, is murder in the first degree.
6. A witness who by association and frequent conversations with the defendant, prior to the homicide in question, has been intimately acquainted with him, is competent to express an opinion as to his sanity.
7. "Undoubtedly, a party may question jurors for the purpose of obtaining information necessary to the intelligent use of his right of peremptory challenge; but the questions must be pertinent, and proper for testing their capacity and competency, and the trial court has some control over the character and extent of such examinations."

Appeal from the Superior Court, Fairfield County; Hon. Alberto T. Roraback, Judge.

Charles B. Cross, convicted of murder in the first degree, appeals. Affirmed.

Findings of the lower court by RORABACK, J. The indictment charged the defendant with the murder of one Sarah C. King in the perpetration of the crime of rape. Upon the trial the State offered as a declaration of the accused, made on November 12, 1899, the following statement, signed by him: "Statement of Charles Bertram Cross, made to J. W. Rogers, Sunday evening, Nov. 12, 1899, Stamford, Conn. I make it of my own free will. I am seventeen years of age, and reside with my grandparents at Prospect Hill, Brooklyn. I have been in the employ of Mrs. Sarah King at the farms since June 1, 1899. On Wednesday evening, November 8, 1899, about

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8 o'clock, Mrs. King and I sat down to supper. While eating supper I got a passionate feeling, as though I should like to have something to do with a woman. About twenty minutes to 9 she said she was going to bed. Then I went upstairs, and hid around until she came up. She came up in a few minutes, and as she was about to enter her room I pushed her, and she fell on the floor. She started to holler, and I grabbed her by the head, and pounded her head on the floor until she became unconscious. I am not sure, but I think I tore all her clothes off, and I then raped her until I satisfied my passion, after which I threw a blanket over her, and ran to Mr. Merritt, and told him I believed some one murdered Mrs. King. I did not pull any drawers out. I had no time to do it. I did not intend to kill Mrs. King. I must have been crazy when I done it. I did not use any weapon of any kind. I simply knocked her down, and I pounded her head on the floor. She died while I was away to the doctor's. I picked her up off the floor, and placed her in the bed, where I raped her. My former statements were false. I have read this carefully, and it is true. This is my confession. C. B. Cross." It also offered another statement of similar character, but more in detail, made the following day. Before offering said statements, the State had offered evidence including proof of the autopsy of Mrs. King, and statements and conduct of the accused on the evening of the murder, to prove that Mrs. King had been raped and murdered as alleged, and that the accused had committed the crime. The defendant objected to the admissibility of these statements, and at his request the jury were dismissed, and evidence received by the court upon the question, were the declarations voluntary? The detective to whom the statements were made, the bailiff who had the prisoner in charge, the accused himself, and the counsel for the accused who was conducting the defense testified. The testimony was conflicting. It appeared during the testimony that the accused was arrested on the night of the killing, and remained in Mrs. King's house until the next morning, when he was taken to the office of the deputy sheriff in Stamford, where he was kept five or six days. During this time no one was allowed to see him except his counsel, and that but once—the afternoon he came to Stamford. His counsel made

several applications to have an interview with him, but was denied the privilege until he had obtained permission from Mr. Fessenden, the States attorney. His attorney was not able to find Mr. Fessenden until the following Monday, when permission was at once given to see the prisoner. After hearing all the testimony, the court found that the declarations were made by the defendant freely and voluntarily, and that he was not induced to make them by any threats, promises, or inducements made to him by any one; and admitted the declarations in evidence. Counsel for defendant duly excepted. After this, and during the examination of the detective before the jury, objection was again taken that the story told showed there was an intimidation which ought to bar the declarations, but the court allowed the same to go to the jury with all the facts and circumstances, the jury to give them such weight as they should deem them worthy of. Afterwards the State introduced declarations subsequently made to Deputy Sheriff Miller. The defense objected on the ground that, since a written declaration had been admitted, an oral one could not be received. The testimony was admitted, and defendant excepted. Afterwards the State offered the testimony of one E. Z. Fallon, without objection by the defendant, that the defendant had stated to him that he had killed Mrs. King, that he had confessed to the fact, and had so confessed because he thought there was no use lying about it any longer. The defendant offered no defense except that of insanity. He did not take the stand himself, but offered the testimony of relatives and medical experts that he was insane. The State offered in rebuttal one Samuel B. Mead, as a nonexpert witness, to show that the accused was sane. The witness testified that he had been acquainted with the accused from last June until the time of his arrest; that he had seen him probably every week, and sometimes three or four times a week; that he had worked with him getting in hay; that he had talked with him on farming in general, and about their work. The defendant objected that such testimony did not lay sufficient foundation to take the opinion of the witness as to the sanity of the accused. The court admitted the opinion, and defendant excepted. The State then introduced in rebuttal several other nonexpert witnesses, and also medical experts. The defendant

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requested the court to charge that, if the killing of Mrs. King was not intended by the accused, but was occasioned simply by striking her head on the floor for the purpose of keeping her quiet, such manner of killing would not imply malice, and the killing would not be murder; and that, if the killing took place in this manner, such killing would not be murder in the first degree, even though the accused was attempting to rape the deceased at the time. The court refused to so charge the jury, but did charge on these points as follows: "When an unlawful, unintentional killing of a human being happens, which is committed in perpetrating or attempting to perpetrate the crime of rape, the killing will be murder, and not manslaughter. If the offense would have been murder at common law, then, although there was no intent to take life, the case, if the homicide was committed in the perpetration or attempted perpetration of rape, as charged, is murder in the first degree. And, gentlemen, if you believe from all the evidence, beyond a reasonable doubt, that the said Sarah C. King with malice aforethought by the defendant, as charged in the indictment, and also that at the time the defendant was perpetrating or attempting to perpetrate the crime of rape, and thereby caused her death, then the accused is guilty of murder in the first degree, if you should find him criminally responsible for such action, although he may not have intended to take the life of Mrs. King." To which charge and refusal to charge the defendant excepted. During the selection of the jury, one Andrew B. Curtis was examined on the *voir dire*. He testified that he had formed no opinion about the merits of the case, and could, in his opinion, act impartially as a juror, and that he would give the prisoner the benefit of every reasonable doubt. He was then examined by counsel for defendant touching his understanding of the duty of the State to prove every allegation beyond a reasonable doubt. After this the counsel asked him: "What do you understand by the phrase, 'the criminal responsibility of the prisoner?' A. The criminal responsibility of the prisoner? Q. Yes, sir. A. I don't know as I exactly understand so as to make an answer to that. Mr. Fessenden: What is the object of that? It doesn't seem to me— Mr. Rowell (interrupting): I will change my question. Supposing the court should charge you



that the criminal responsibility of a person is not determined solely from the act or nature of the act alone, but that the law takes into consideration the state of his mind when that act was committed, and in some cases says that he was incapable of committing the crime, or exempts him altogether from liability—from that charge, what would you understand?" The State objected to the last question, and the court sustained the objection. Defendant excepted. Said Curtis was duly accepted as a juror, no objection being made by the defendant to his qualification.

Assignments of errors: (1) The admission of the declarations of the accused; (2) the refusal of the court to charge as requested and the charge as made; (3) the admission of the testimony of the witness Mead; (4) the exclusion of the question to the juror Curtis.

*John C. Chamberlain* and *George P. Rowell*, for the appellant.

*Galen A. Carter*, Assistant State's Attorney, for the State.

HAMERSLEY, J. The trial court, after hearing all the testimony as to the circumstances attending the declarations or admissions of the accused, finds that they were made freely and voluntarily, and that the defendant was not induced to make them by any threats, promises, or inducements made to him by any one. This finding is upon a preliminary question of fact. The conclusion is drawn from conflicting testimony, and may be correct or incorrect, according to the credit given to witnesses. We cannot review such a finding. Whether, under these circumstances, the declarations should have been excluded on the ground that they were of little weight, or liable to be untrue, or that their admission would be, on the whole, unfair to the prisoner, was a matter of discretion with the trial court, and its exercise is not ground of error unless this court can see plainly that the discretion was abused. In view of all the circumstances detailed at length in the finding of facts, we do not feel justified in saying that the discretion was so abused. This subject is fully considered in the recent case of *State v. Willis*, 71 Conn. 293, 41 Atl. Rep. 820, and that decision governs the present case.

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Stress has been laid on the fact that shortly after the prisoner's arrest he retained and had an interview with counsel, and for the following three days the bailiff in charge refused every one (including the counsel) who had not obtained permission of the State's attorney access to the prisoner, and that the applications of counsel for a further interview were denied until he was able to find the attorney. The trial court has found that, notwithstanding this, the declarations were voluntary. The conclusion is not necessarily inconsistent with the evidence. There may have been no relation between the conduct of the bailiff and the voluntary character of the declarations, the inference to be drawn depending largely on the judgment of the court as to the apparent character and credit of witnesses. The action of the bailiff, however, would seem to have been wrong, and to call for investigation from his superior officer. A prisoner before trial is in custody of the law for safe-keeping. The sheriff is responsible for that, and may regulate and limit access of outsiders, so far as may be necessary, under the circumstances of each case, to the security of his prisoner and the proper management of the jail; but he should, at reasonable times, and under reasonable conditions, permit the free access of counsel to his client, and this duty may be enforced. As a general rule, the mere bald admission of guilt resulting from conversations with detectives or officers in charge is not by itself of controlling weight. The inference that one not guilty of the particular offense charged would not make such an admission under such circumstances is by no means always clear. The weight and significance of such admission depends on the nature of its connection with the facts proved. The trial court, under our practice, may properly exclude an admission of this kind if deemed of little weight, although our policy has more recently drifted towards a larger trust, in the jury's discrimination in respect to the weight of relevant testimony, as in the case of parties in interest. Possibly in the present case the court might properly have excluded the fact that the accused had made these declarations as under all the circumstances entitled to no very great weight, and unfair to the prisoner, although in truth the conduct of the accused as thus shown rather tended to prove his main contention—that of insanity. But



the power of the trial court in the reasonable exercise of its discretion to submit to the jury the weight of such relevant conduct with all its attendant infirmities is clear, and its action is not a reviewable error.

There is no error in the charge. The meaning of our statute defining murder in the first degree, as enacted in 1846, has not been changed by subsequent legislation. It does not define a new crime, nor in any way affect the definition of the crime of murder as it before existed. It simply sets forth the circumstances attending the crime which must determine the punishment of murder, whether it shall be death or imprisonment for life. *State v. Dowd*, 19 Conn. 388. The common-law murder is deemed murder in the first degree when perpetrated in the commission of the crime of rape. By our common law, an unlawful homicide, perpetrated in the commission of another crime of the nature of felony, is murder. If that other crime is rape, the statute deems the murder to be in the first degree. The act, in substance, says that the murder with express malice is murder in the first degree, but with implied malice is murder in the second degree, except those enumerated cases of murder with implied malice which are expressly made murder in the first degree. *Smith v. State*, 50 Conn. 193, 197; *State v. Hamlin*, 47 Conn. 95. The construction contended for in behalf of the defendant is strained, and inconsistent with the evident purpose of the act. The passage cited from Dr. Wharton's work on Criminal Law indicating a different view is not applicable to our statute under our decisions. The admission of the testimony of the witness Mead is not error. He had stated the time he had known the prisoner, the frequency and nature of his interviews, and the topics of their conversations. Under these circumstances the court might admit his opinion, based on his knowledge and acquaintance as detailed, that the accused was of sound mind. *Dunham's Appeal*, 27 Conn. 192, 198; *Sydleman v. Beckwith*, 43 Conn. 1, 13; *Shanley's Appeal*, 62 Conn. 325, 330, 25 Atl. Rep. 245; *Chamberlain v. Platt*, 68 Conn. 126, 130, 35 Atl. Rep. 780.

The exclusion of the inconsequential question put to the juror Curtis is not error. Undoubtly, a party may question jurors for the purpose of obtaining information necessary to the

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intelligent use of his right of peremptory challenge; but the questions must be pertinent, and proper for testing their capacity and competency, and the trial court has some control over the character and extent of such examinations. There is no error in the judgment of the Superior Court. The other judges concurred.

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PEOPLE v. MILLER.

135 Cal. 69—87 Pac. Rep. 12.

Decided Dec. 13, 1901.

CONFESSIONS:\* *Preliminary inquiry—Harmless error—Mental condition—Questions of competency.*

1. Before a confession is admitted in evidence, it devolves upon the prosecution to show that it was voluntarily made; in which inquiry the defendant has the right to cross-examine; but a denial of such right upon the preliminary inquiry is not reversible error, when upon a subsequent cross-examination the confession appears to be competent.
2. The mere fact that the defendant was under arrest at the time of the confession does not, of itself, invalidate it.
3. Evidence that the defendant at the time of making a confession was not in full possession of his mental faculties, because of a bullet wound in the head, is a proper matter to be considered by the jury when weighing the confession; but does not necessarily render it inadmissible.

Appeal from the Superior Court, Alameda County; Hon. W. E. Greene, Judge.

W. D. Miller, convicted of manslaughter, appeals. Affirmed.

J. M. McElroy and D. Kinsell, for the appellant.

Tirey L. Ford, Attorney General and A. A. Moore, Jr., Deputy Attorney General, for the people.

HARRISON, J. The appellant was convicted of manslaughter, and sentenced to imprisonment in the State prison for ten years, and has appealed therefrom. The only question presented upon the appeal is the correctness of the ruling of the Superior Court upon the admission in evidence of certain statements of the defendant made while he was under arrest.

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\*See CONFESSION in Table of Topics.

It appears from the bill of exceptions that about a quarter after 11 o'clock in the evening after the homicide the defendant was asked why he killed old man McFarland in the morning, and replied "that he was on his row, and throwing clods at him, and he told him to get off, and he would not get off, and he got mad and shot him." At the time he was asked the question and made the statement he was lying on the ground in front of his tent, and was under arrest and in charge of an officer. There were a number of his fellow workmen present, and several were questioning him at once. One of those present (the witness Terry) said, "Gentlemen, let one man ask him a question if anybody wants to ask him," whereupon Jones, one of those present, asked the defendant the above question, to which the defendant made the above statement. Before giving the statement of the defendant, the witness Terry had testified, in answer to questions by the district attorney, that the statement by the defendant were free and voluntary on his part, and that there had been no threats or offer of reward or immunity from punishment, nor did any one tell him it would be better for him to make a statement, or worse if he did not, or try to induce him to make a statement. Upon his being thereupon asked to give the statements, the counsel for the defendant requested permission to ask the witness some questions showing the conditions under which the statement was made. The court declined to grant this request, saying that they could question him upon cross-examination. The court also made a similar ruling during the examination of the witness Jones. Before any confession of a defendant can be offered in evidence, it must be shown by the prosecution that it was voluntary, and made without any previous inducement or by reason of any intimidation or threat. This is a preliminary question upon the admissibility of the testimony, addressed to the court, and to be determined by it, and not by the jury. Upon such preliminary inquiry the court should permit a cross-examination of the witness for the purpose of showing the particular circumstances under which the confession was made, before permitting the confession itself to be given in evidence. A refusal to permit such cross-examination will not, however, justify a reversal of the judgment, when it appears from the record

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that the defendant was not prejudiced thereby. If the cross-examination of the witness after the confession has been given in evidence fails to show that it was not given voluntarily, or fails to impeach his previous testimony in that respect, it is evident that the defendant was not prejudiced by being refused a prior cross-examination. The only additional facts shown on the cross-examination of the witness Terry were that the defendant was under arrest at the time the confession was made, and that there was a crowd of about fifty people there, and that the officer in whose charge he was declared to one of them that he would protect his prisoner. It was not shown that there was any manifestation by the people against the defendant, or any threats towards him on the part of any one; and the mere fact of his being under arrest did not take away the voluntary character of his confession, or render it inadmissible. *People v. Devine*, 46 Cal. 46. Cross-examination of the witness Jones failed to elicit anything tending to contradict his previous testimony as to the voluntary character of the confession.

Testimony was given upon the cross-examination, and also by other witnesses, tending to show that, by reason of a bullet wound in his head, the defendant was not in the full possession of his faculties at the time he made the statement in reply to Jones. This, however, did not affect the admissibility in evidence of the confession itself, but was evidence to be considered by the jury in determining the weight or effect to be given to it.

The judgment is affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; VAN DYKE, J.; MCFARLAND, J.; HENSHAW, J.; TEMPLE, J.

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COMMONWEALTH v. EPPS.

193 Pa. St. 512—44 Atl. Rep. 570.

Decided Nov. 6, 1899.

CONFESSIONS: \* *Pennsylvania rule as to the preliminary inquiry—Homicide, in perpetration of robbery.*

1. It is a well-established rule in Pennsylvania that upon the preliminary inquiry as to the competency of a confession, the court need not hear evidence for the defense, before admitting the con-

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\*See CONFESSION in Table of Topics.

fession, but such evidence may afterwards be given, and then it becomes a question for the jury to determine as to whether or not the confession was voluntary.

2. A confession to private persons who had no power or influence which might have induced the prisoner to expect favor was properly admitted.
3. Verdict of murder in the first degree is proper where the killing was in the perpetration of a robbery.

Appeal from the Court of Oyer and Terminer, Philadelphia County.

William Epps, convicted of murder in the first degree, appeals. Affirmed.

*Samuel Chew and Richard Vaux Buckley*, for the appellant.

DEAN, J. The defendant, along with one Samuel Dodson, was charged with the murder of Mary Anne Lawler at her house on Tasker street, Philadelphia, on January 30, 1899. The deceased had been strangled in the attempt to rob her. At an early stage in the trial the Commonwealth called as a witness Detective Geyer, who testified to a confession of the crime to him by the prisoner after his arrest. It was also testified by Irene Henderson, the prisoner's mistress, and Mamie Henderson, her sister, that the night of the murder he brought to their house certain property which he admitted he had taken from the dwelling of deceased, and that the next day had said to them he "had not known he had done it"—that is, killed Mrs. Lawler—until he saw it in the newspaper. Other witnesses testified to seeing him in the neighborhood of Mrs. Lawler's house about 9 o'clock of the night of the murder, and that he brought home a woman's skirt similar to one worn by Mrs. Lawler. It was further shown that the prisoner fled to Richmond, Va., soon after the death of Mrs. Lawler became known. On this and other evidence, the jury found the prisoner guilty of murder of the first degree, and he was sentenced to death accordingly.

We have this appeal, with eight assignments of error. The prisoner's defense rested on an *alibi*, which the jury did not credit. The evidence adduced by the Commonwealth was ample to show that the prisoner had murdered deceased in the perpetration of a robbery. There is nothing in any of the assignments of error calling for notice, except the first and second,

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which complain of the admission of the testimony as to the confessions.

It is alleged that the confession to Detective Geyer was involuntary, and therefore inadmissible. There is no doubt about the law applicable to the question. In one of the earliest cases (*Commonwealth v. Dillon*, 4 Dall. 117), Chief Justice McKean said: "The true point for consideration is whether the prisoner has falsely declared himself guilty of a capital crime;" and, if an inducement be held out or a threat made calculated to prompt the prisoner to falsehood, then the confession must be excluded. When Detective Geyer was on the stand, after stating he had arrested the prisoner at Richmond, and brought him to Philadelphia, he was asked by the district attorney whether, while under arrest, the prisoner had made any statement to him about the matter, for the purpose of showing a confession of guilt. To this counsel for the prisoner objected, and asked leave of court to call the prisoner as a witness before the court, to show that the alleged confession was involuntary. The court ruled that the time to call the prisoner had not yet come; meaning that he could be called later in the trial. To this ruling counsel for prisoner excepted. It is now argued that this ruling was error; that whether the confession was voluntary was solely a question for the court; and that, therefore, preliminary to receiving the evidence of the detective, it was the duty of the court to hear the testimony of the prisoner, from which the court might have decided the confession was involuntary.

Detective Geyer testified to the confession, and that it was wholly voluntary; that he had distinctly told the prisoner, before he made it, that he did not want to hear it unless made voluntary; that he said nothing to excite hope or fear. The prisoner said, "I might as well tell you all I know;" then gave to the officer a detailed statement of the crime. The prisoner's counsel subjected the witness to a most rigid examination, with the purpose of showing that the confession was not voluntary, but failed to shake his testimony in the least. The court declined to hold that the confession was involuntary. The question arises whether the court should have first heard the testimony of the prisoner before permitting the officer to testify. For refusing so to do is the error complained of. The practice



in this State is well settled. If it appear from the testimony of the witness that the alleged confession was not voluntary, it must be excluded, and the court must at once so decide; but, if voluntary, the witness can testify to it, and if subsequently, in the course of the trial, there be evidence tending to contradict the witness, then the question of credibility is for the jury, who must be instructed that, if not voluntarily made, they must wholly disregard it. In *Commonwealth v. Harman*, 4 Pa. St. 269, and *Fife v. Commonwealth*, 29 Pa. St. 429, it appeared without doubt, when the confession was offered, that it was not voluntary. We held not only that it should have been excluded, but should not have been heard. But in *Rizzolo v. Commonwealth*, 126 Pa. St. 54, 17 Atl. Rep. 520, the confession was made to the officer by the prisoner while under arrest. The officer testified that it was wholly voluntary. Judge Rice, now president of the Superior Court, was the trial judge. He admitted the testimony. Afterwards, when the defense was heard, the prisoner to some extent contradicted the officer. Their credibility was submitted to the jury, with instructions to disregard the confession, if they believed it involuntary. The admission of the testimony as to a confession was one of the assignments of error. We overruled the assignment. In *Commonwealth v. Van Horn*, 188 Pa. St. 143, 41 Atl. Rep. 469, the prisoner's twenty-seventh assignment of error is in substance the one made here; our Brother Green, speaking for the court, saying: "When the Commonwealth offered to prove a voluntary confession made by the prisoner, his counsel applied to the court for permission to show that a previous confession had been obtained by undue means. The court refused the application, and the testimony proceeded in the usual way. If the application had been granted, it could not have prevented the admission of the Commonwealth's evidence, and the only result would have been a question of credibility, as between the prisoner and the officer who testified to his voluntary confession." See, also, *Commonwealth v. Shew*, 190 Pa. St. 23, 42 Atl. Rep. 377. While some of the cases from other States, cited by counsel for the prisoner, seem to hold that it is the sole duty of the court to at once decide, before hearing the confession, from the conflicting evidence of witnesses, whether the

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confession was voluntary, the settled practice in this State is otherwise. The prisoner has here the right to examine fully the witness called by the Commonwealth to establish the alleged confession. If it then appear that it was not voluntary, it should be rejected, without being heard; if it appear to have been voluntary, then it should be received; if afterwards there be testimony contradicting the witness, then it becomes a question for the jury.

There was not the semblance of error in admitting the testimony of the two Henderson women, as to the confession made by the prisoner to them. They were not officers, who had power and influence which might have induced the prisoner to expect favor. There is nothing of merit in any of the complaints made by prisoner. He had an eminently fair and impartial trial, and the verdict of guilty of murder of the first degree was fully warranted by the testimony and the statute. Whether it was his intent to kill the victim he had robbed was wholly immaterial. The killing occurred in the perpetration of a robbery by him, and the statute, therefore, fixes the degree of the crime. The judgment is affirmed, and it is directed that the record be remitted to the court below, that the sentence may be carried into execution according to law.

NOTES (by J. F. G.).—The court frankly admits that the decision is at variance with other States; but endeavors to support it by citing Pennsylvania cases. The cases cited do not sustain it; except *Commonwealth v. Van Horn*, 188 Pa. St. 143, which also declares that the doctrine is well settled in Pennsylvania, citing as authority: "*Rizzolo v. Commonwealth*, 126 Pa. St. 54, and other cases." In the *Rizzolo Case* it does not appear that the defendant was refused the right to introduce evidence during the preliminary inquiry, as to the competency of the confession. The assertion in the above opinion that as to the confession in *Fife v. Commonwealth*, 29 Pa. St. 429, "it appears without doubt that when the confession was offered, that it was not voluntary," is without foundation. In that case *Fife*, Charlotte Jones and Monroe Stewart were placed on trial for murder. The confession of Charlotte Jones was admitted in evidence and all three of the defendants were convicted of murder in the first degree, which conviction was sustained by the Supreme Court. The writer has a vivid recollection of that case, it occurring during his early boyhood in the adjoining county. *Fife* and Charlotte Jones, if not Stewart, were hung at Pittsburgh.

In *Commonwealth v. Dillon*, cited in above opinion, nothing is said as to any offer of evidence by the defendant during the preliminary



inquiry; but the court carefully instructed the jury to be cautious in regard to the confession; and that if a substantial doubt existed as to its being voluntary, to acquit the defendant. The verdict was not guilty.

In *Commonwealth v. Harman*, 4 Pa. St. 269, cited in the above opinion, the prosecution was about to introduce a confession, when the defendant's counsel moved to interrupt the proceeding that he might introduce a witness to show that the confession was not voluntarily given. The witness was then called, and on his testimony the court held that the confession was not competent and refused to permit it to be given in evidence.

The writer has consulted the cases cited on confessions, by the Attorney General in his brief in *Commonwealth v. Van Horn*, *supra*, and does not find any case upon the direct question, as to the right of the defendant to introduce evidence during the preliminary inquiry to show that the confession is not competent. Evidently the Pennsylvania Supreme Court, misconstrued the right and duty of the jury to weigh the evidence, as a power to pass upon its competency. The case of *Commonwealth v. Shew*, 190 Pa. St. 23, 42 Atl. Rep. 377, cited in the opinion, is also not in point; but rest merely upon the right of the jury to weigh the testimony, as will be observed from the opinion which we here give in full:

MITCHELL, J.: The appellant was indicted jointly with James Eagan, but severed in the trial. Both were convicted of murder of the first degree. The questions raised upon their appeals are substantially the same, and have been disposed of in the opinion in *Eagan's Case* (filed herewith, 42 Atl. Rep. 374. Each prisoner made two statements or confessions, in which he admitted participation in the crime, but sought to put the actual killing upon his confederate. In *Eagan's Case* no contradiction of the confessions was made by the prisoner, or by any witness in his behalf, though his counsel argued that the circumstances showed duress. In the present case, however, Shew went on the stand and testified that the confessions were extorted from him by promises and threats of the district attorney. *The confessions had already been admitted in evidence*, upon affirmative testimony that they were voluntarily made, and the only effect of Shew's testimony to the contrary was to raise a question for the jury. It was properly submitted to them with instructions to disregard the confessions, if they found they were not voluntarily made. In this there was no error. Judgment affirmed, and record remitted for purpose of execution according to law.

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## STATE v. HILL.

65 N. J. L. 626—47 Atl. Rep. 814.

Decided Dec. 7, 1900.

(The Atl. Rep. gives Jan. 11, 1901, as date.)

CONFESSIONS:\* *Admissibility of—Practice in determining competency—Homicide—Evidence.*

1. A confession of a prisoner, made to an officer after the following undisputed conversation had with the prisoner before it was made, viz.: "I told him I was an officer. Asked him first if he knew me, and he said: 'Yes, he ought to know me; he knowed pretty near all the police officers.' I said: 'Well, I am an officer; you don't have to tell me anything if you don't want to.' I says: 'What you tell me the court might ask me;' and he said: 'Well, you are a friend of mine; you don't have to say all that I tell you.'"—Is admissible in evidence on the prisoner's trial for murder. It does not violate the rule established by this court in *Roesel v. State*, 41 Atl. Rep. 408, 62 N. J. Law, 216, and *Bullock v. State* (N. J. Err. & App.), 47 Atl. Rep. 62.
2. When a confession of the prisoner is proposed to be offered by the State, it is within the right of the counsel of the prisoner, before the confession is admitted, to examine fully the witness who proposes to testify to the confession as to all the circumstances surrounding the alleged making of it.
3. The defense may also call and examine, to aid the court in passing upon its admission, independent witnesses, who may know of the circumstances surrounding the making thereof, or of the physical or mental condition in which the prisoner was at the time the alleged confession was made.
4. Where, however, the State has laid a foundation for the admission of a confession made to a magistrate or officer by proof that it was made by the prisoner without promise or threat,—that is, that it was voluntarily made,—then a basis is laid for the court to admit the testimony, and it should be admitted, unless the counsel of the prisoner asks leave to examine the witness about to testify, or to put in other evidence, or both, relative to the facts and circumstances surrounding the making thereof.
5. The law always presumes a man to be conscious and sane, and if the contrary exists, thereby defeating the natural presumption, it must be shown by the party who alleges it.
6. Cartridges (loaded shells) in a small paper package taken from the pocket of a coat found in the room where the shooting occurred, immediately after the shooting, and which fitted the pistol used by the prisoner, were properly admitted in evidence by the court, under the circumstances disclosed in this case, as a part of the *res gestæ*.

(Syllabus by the Court.)

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\*See CONFESSION in Table of Topics.

## Court of Errors and Appeals.

Error to the Court of Oyer and Terminer, Camden County.  
Robert F. Hill, convicted of murder, brings error. Affirmed.

*Frederick A. Rex and Howard L. Miller, for the plaintiff in error.*

*Frank T. Lloys, Prosecutor of the Pleas, for the State.*

FORT, J. The plaintiff in error was indicted in the Court of Oyer and Terminer of the County of Camden for the murder of his wife, Edith Hill. On a traverse of the indictment the jury found him guilty of murder in the first degree, and upon that conviction sentence of death was pronounced. By the writ of error in this case, the entire record is brought to this court for review, pursuant to the statute (Laws 1898, p. 915, § 136). To the charge there was a general exception taken, and several exceptions to the admission of evidence. The assignments of error and reasons for reversal, however, have not been confined to the exceptions, but have been made to various admissions of evidence and rulings by the court, to which no exception was taken at the trial. This is pursuant to the provisions of our criminal procedure act, which permits such a specification of causes for relief or reversal upon writ of error in criminal cases where the trial justice shall certify that the record brought up is the entire record in the cause. Laws 1898, p. 915, §§ 136, 137.

It will be necessary, in determining the questions here argued, to consider but two of the assignments of error, as all the others are without substance, and at the hearing only these two points were seriously relied upon by counsel for reversal.

The fourth assignment of error is founded upon the admission by the court of the confession of the prisoner to John Anderson. Anderson was a police officer of the city of Camden, and was placed in charge and as guard of the prisoner after the shooting, and while he was in the hospital suffering from a wound self-inflicted. The testimony so objected to is as follows: "Q. You are a police officer? A. Yes, sir. Q. Do you know the defendant, Robert Hill? A. I did not know him until the night I was sent there to take charge of him. Q. Where were you sent to take charge of him and when? A. Sent to the

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hospital the night this occurred. Q. Did you have any talk with him the next day? A. Yes, sir. Q. What time in the day? A. Why, between the hours of eleven o'clock in the morning and seven at night, Sunday. Q. What was the subject of this conversation? A. Why, the first thing I told him— Q. Now, just tell me what the subject of your conversation was. A. Why, the trouble he and his wife had. Q. Before he said anything to you upon that subject did you say anything to him by way of caution? A. Yes, sir. Q. And, if so, what? A. I told him I was an officer. Asked him first if he knew me, and he said, 'Yes, he ought to know me; he knowed pretty near all the police officers.' I said, 'Well, I am an officer; you don't have to tell me anything if you don't want to.' I says, 'What you tell me the court might ask me;' and he said, 'Well, you are a friend of mine; you don't have to say all that I tell you.' Q. What reply did you make to that? A. I didn't make him no answer. Q. Now, after that, what did he say about the thing itself? A. Why, I ask him who shot his wife—if he did? He said, 'Yes.' I asked him whereabouts he stood in the bedroom. Asked him where he got the gun from, and he said, 'Out of his pocket.' I asked him if he put it in his pocket for that special occasion, and he said, 'No, he usually carried a gun whenever he went out.' Q. What else? A. I asked him why he did it, and he said he was jealous of his wife; jealous of her. Q. Was that the whole of his conversation? A. Yes; about all the conversation."

The rule governing the admission of confessions by prisoners, when made to a magistrate or police officer, was settled by this court in *Roesel v. State*, 62 N. J. Law, 216, 41 Atl. Rep. 408, and it would be useless to restate it here. To the same effect is the decision in *Bullock v. State* (N. J. Err. & App.), 47 Atl. Rep. 62. While it is alleged here that the confession was made by the prisoner when he was not competent to know of what he was speaking, still no offer is claimed to have been made by his counsel to prove that such was his condition before the court admitted the confession.

When a confession is offered by the State in a criminal case, it is the right of the counsel of the prisoner, before it is admitted, to cross-examine the witness who proposes to testify to it

as to circumstances surrounding the making of it, and the defense may also call at the same time independent witnesses, and examine them, going thoroughly into the whole matter as to how the confession came to be made, the parties present, the physical condition and state of mind of the prisoner at the time it was made, and then the court, with all those facts before it, is to pass upon its admission. In this case no offer was made to show the condition of mind or body alleged to have existed in the prisoner at the time the confession was made. It is too late to raise such a question on error in this court, when no attempt was made in the court below to prove facts which, if they existed, must have been within the knowledge and ability of the prisoner to establish. The law always presumes a man to be conscious and sane, and if the contrary exists, thereby defeating the natural presumption, it must be shown by the party who alleges it. The condition, mental and physical, of a prisoner at the time of the alleged confession, if shown to the judge, may very materially affect his decision upon the question of its admission, and the prisoner has the right to have it all disclosed before the court passes upon it; but it is not essential to the State's case for it to bring out such facts in the first instance. As to the confession admitted in this case, and here under review, we think that, while the preliminary testimony of the circumstances surrounding the making of it may not have been shown as fully by the State as should always be exacted by the court before admitting a confession of the prisoner in a homicide case, still it discloses by the testimony of the officer himself, unshaken by any cross-examination of the prisoner's counsel, and uncontradicted by any other evidence, that he said to the prisoner before he made the statement to him: "Well, I am an officer. You don't have to tell me anything if you don't want to. What you tell me the court might ask me." No promise was held out by the officer, nor was any threat made. The confession seems to have been voluntary, and that is all that is required to be proven by the State to lay the foundation for its admission. It is the safer rule for the court, in cases where the life of a prisoner is at stake, to require a complete disclosure of all the facts and circumstances surrounding the confession, and to call upon the counsel of the State and of the prisoner to

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give to the court the fullest information possible to aid the court in its decision upon the admission of the testimony, but no adjudication in this State so requires as a preliminary requisite to its admission. In this case there was no question, under the evidence, about the fact of the guilt of the prisoner of the crime of murder in the first degree. The shooting was undoubtedly done by the prisoner, and he was the only person in the room with his wife at the time the shooting occurred. He fired four shots at his victim, all of which took effect, and any one of which, it would appear from the evidence, would have probably proved fatal. The only effect of the testimony in this confession was to furnish additional evidence upon which to fix the degree of the crime as that of the first degree. But, irrespective of this testimony, it would be impossible to conclude, under the evidence in this case, that sufficient premeditation and deliberation did not exist, from the use of a deadly weapon and by the firing of the four shots that were fired by the prisoner, to make it a clear case of first degree. Intent to kill is beyond any question established by this testimony. There is other testimony in the cause proving statements by the prisoner prior to going to the house of his victim, indicating that he intended to take her life as well as his own, and he did take her life and attempted to take his own. The trial court would have been justified in marshaling before the jury the facts which go to establish premeditation in this case in a much stronger light than it did. We do not think, under all the circumstances in the case, that the prisoner was prejudiced by the admission of the confession, and hence its admission is not reversible error.

The only remaining question is the admission in evidence by the court of some loaded shells, which it is alleged were taken from the pocket of a coat found in the room in which the prisoner committed the murder. The proof was that these shells were in a small paper bag, which paper the prisoner identified as similar to the one which he obtained, with cartridges like those found therein, at a store in the city of Camden, and it also appeared in evidence that those cartridges fitted the pistol used by the prisoner to kill his victim. The ground upon which objection was made to the admission of those shells was that there was no proof that the coat from the pocket of which they



were taken was the coat of the prisoner. The coat itself was not offered in evidence, the prosecutor says by inadvertence. It appears by the testimony that the prisoner had been an employee of the ferry company, and that as such he wore a blue suit, and that on the day of the murder, when arrested, he was in his shirt sleeves, with only his pants and vest upon his person. The pants and vest which he had on were blue, and of the kind worn by ferrymen, and the coat found in the room was a ferryman's coat. No other coat was found in the room, and the prisoner did not go upon the stand and testify that this was not his coat from the pocket of which the shells were taken. The presence of this coat in the room at the time of the murder would have made its introduction in evidence and use by the State competent as part of the *res gestæ*, if the State had elected to have offered it, and we think that any article found in the room at the time of the murder, which can be traced to the prisoner, and which may have been in any wise connected with the murder, or which may in any wise show his state of mind and intent, could be introduced in evidence. While it would have been wiser for the State to have offered the coat in evidence, still we think the contents of the pocket of the coat could be admitted in evidence without the introduction of the coat itself. *Commonwealth v. Sturtivant*, 117 Mass. 122; *Hodge v. State* (Ala.), 12 South. Rep. 164, 38 Am. St. Rep. 146; *People v. Johnson*, 140 N. Y. 350, 35 N. E. Rep. 604; *State v. Stair*, 56 Am. Rep. 449.

In any event, in view of the fact that the room was immediately guarded after the arrest of the prisoner, and that the officers who guarded the room until the paper, with the cartridges therein, was taken from the coat pocket, testified that no change was made in the articles in the room; and in view of the fact that the prisoner was arrested without a coat, and of the proof that he entered the house, just before killing his victim, with a coat; and of the fact that, notwithstanding it was within the power of the prisoner to have proven that this was not his coat from which the cartridges were taken, if he had wished to disprove it, and that he did not do so, although he was examined as a witness in the cause—we do not think that the admission of this testimony was such error as would justify

a reversal. not offered the prisoner the coat, evidence, circumstance piece of to verse because dence than justified the theory for the conviction

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a reversal. There seems to be no reason why the coat was not offered in evidence, and there is no pretense on the part of the prisoner that he called for or demanded the production of the coat, or insisted that the State should or should not put it in evidence, and he should not be permitted here, under these circumstances, to question the failure to introduce that additional piece of testimony. To sustain this contention would be to reverse because the State did not introduce more damaging evidence than it did, even when that offered and rightly admitted justified the conviction. This would, to say the least, be a novel theory for a reversal. We can find no error in the record, and the conviction is affirmed.

NOTES (by J. F. G.).—On pages 289 and 290 of 11 American Criminal Reports, we gave a short review of several authorities to the effect, that on the preliminary inquiry as to the admissibility of a confession, the defendant has not only the right to cross-examine a witness or witnesses called to prove it, but can introduce counter evidence before the court passes on the question of competency. As such is the general trend of opinion; and the reasons are so manifest, we probably would, at this time, have simply referred to those notes, and to *Commonwealth v. Culver*, 3 American Criminal Reports, 81, without further comment, were it not for the preceding case of *Commonwealth v. Epps*, announcing an adverse rule.

The general doctrine, that the court passes upon the competency of a confession, while the jury weighs it, if admitted, and that the burden is with the prosecution in the first instance to prove the competency, makes the above rule axiomatic; for on any issue where the prosecution has the affirmative, it would be contrary to the fundamental principles of justice governing criminal trials, to permit that issue to be passed upon without permitting the defendant to be heard. To deny the defendant this right, would be to eliminate one of the essential elements of a trial and in that respect proceed without due process of law.

For a list of authorities upon this subject, see 6 Am. & Eng. Ency. of Law (2d ed.), 554-556, and 12 Cyc. 480-483.

As a matter of convenience, and especially to those who have not access to large libraries, we give the following brief opinions in full:

PEOPLE v. SOTO.

49 Cal. 67—Oct., 1874.

By the Court, CROCKETT, J.: At the trial, the prosecution offered in evidence, as admission of guilt, a deposition made by the defendant on his examination before the committing magistrate. The defense objected to the evidence on the ground, amongst others, that the confession "was not free and voluntary, but was the result of threats made, and inducements held out to him prior thereto by the officers of the



law, who had him in custody; and asked leave to introduce evidence in support of the objection." The application was refused and the defendant excepted; and thereupon the deposition was read in evidence. It is difficult to see on what ground the application was refused. Nothing is better settled than that a confession extorted by threats, or resulting from inducements held out by the officers of the law to a prisoner in their custody, is not admissible in evidence.

When such a confession is offered in a criminal case, it is incumbent on the prosecution to lay the foundation for its introduction by preliminary proof showing *prima facie* that it was freely and voluntarily made. No such proof was offered in this case, and the court erred in admitting the confession in evidence without any showing on this point. But the court went further, and denied to the defendant an opportunity to show affirmatively that the confession was not voluntary.

For this error the judgment must be reversed and a new trial awarded.

(A supplemental opinion on matters likely to arise on the new trial follows; but is here omitted, as not bearing on the subject under consideration.—J. F. G.)

#### JACKSON V. STATE.

83 Ala. 76—Dec. Term, 1887.

CLOFTON, J.: The established doctrine in this State is, that all confessions are presumptively involuntary and inadmissible; and that it is incumbent on the State to show, *prima facie*, that a confession was freely and voluntarily made, before it can be admissible in evidence to the jury. The determination of this inquiry, as the determination in respect to the admissibility and competency of all evidence, lies within the province of the court. The inquiry, however, should not be determined on *ex parte* evidence. Whenever the admissibility of any evidence depends on extraneous facts both parties should be allowed to introduce proof as to such facts. In determining whether the confession proceeded from the volition of the accused, or from an influence improperly exerted, the judge should hear and determine the question of admissibility, not merely upon such showing as the prosecutor may deem proper to make, but also upon the proof which the defendant may introduce in order that he may not be prejudiced by the admission of illegal evidence. After the prosecution has shown a *prima facie* case, it is the right of the accused to introduce testimony to rebut, and to show that the confession was not voluntarily made; and in determining whether a *prima facie* showing of a voluntary confession is made, the court should consider the testimony introduced by both parties. *Rufer v. State*, 25 Ohio St. 464; *People v. Soto*, 49 Cal. 67.

The error in refusing to allow the defendant to introduce proof that the confession made at the time of the preliminary examination was not voluntary, but was induced by promises of release and reward, is not cured by allowing such evidence to be subsequently admitted to the jury. It is true, that if the jury are not satisfied, in view of all the evidence, including the facts and circumstances of the confession, that it was free and voluntary, they may reject it as wanting in credibility; but they cannot review or disregard the determination of the

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court as to its admissibility. *Redd v. State*, 69 Ala. 255; *Young v. State*, 68 Ala. 569. The prejudice to the defendant consists in admitting to the jury evidence, which may have been shown to be inadmissible if the court had allowed the opportunity, but which they are bound to regard.

Reversed and remanded.

## STATE V. KINDER.

96 Mo. 548—Oct. Term, 1888.

BLACK, J.: The defendant appealed from a conviction had in the criminal court of Johnson County on an indictment for larceny, committed in the dwelling-house of John Hopkins. Hopkins and Constable Hurt went from Johnson County to Lexington, Lafayette County, with a warrant, and there arrested the defendant. They placed him in the jail at that place on the night of the arrest, and on the succeeding day took him to Johnson County before the justice by whom the warrant was issued. Hopkins and Officer Hurt both testify to confessions made by the defendant to them whilst he was in jail and whilst on the road the next day. These confessions were all made in the presence of the officer and whilst defendant was in his custody. Hurt and Hopkins testified that the confessions were not procured by threats or promises.

Hopkins was the first witness for the State, and when he came to relate these confessions, the defendant asked the court to cause the jury to be withdrawn, that the court might hear the evidence and pass upon its admissibility. The jurors were withdrawn, and after Hopkins had related the circumstances under which the confessions were made, the defendant offered to show by other evidence that the confessions were not voluntary but were made from fear and compulsion. The judge refused to hear the evidence.

During the trial the defendant called Charles Barr, who testified that he was in the jail at Lexington when Hopkins and the constable came there; that they told the defendant they had him and he had better acknowledge that he took the property; that defendant made no acknowledgment, and one of them said he had better acknowledge or they would break his neck, string him up, or something to that effect.

Hurt and Hopkins both say that on the road the next day they had a new rope, about the size of a clothes-line, but that they bought and used it only for securing the defendant whilst passing through some timber; that defendant and Hopkins rode on the front seat of the wagon and Hurt on the rear seat.

Defendant, in testifying in his own behalf, as to what transpired on the road, says: "Hurt said, if I didn't acknowledge taking the property (a pair of boots, a pair of pants and a pocket-book), they would hang me. I said all right, and I acknowledged. Hurt was drunk and rode with a pistol on the seat."

The court, at the request of the defendant, instructed the jury to exclude from their consideration any confessions made under fear or compulsion.

When there is reason to believe that the confessions were obtained by the influence of hope or fear, it becomes the duty of the judge to hear the evidence and determine whether it shall go to the jury.

Whether the confessions were made with that degree of freedom which allows of their admission, is a preliminary question for the judge to determine. This is the long-settled rule in this State. *Hector v. State*, 2 Mo. 167; *State v. Duncan*, 64 Mo. 262; *State v. Patterson*, 73 Mo. 696. This being the law, it would seem to follow that the judge should hear all the evidence bearing upon the question whether the confessions were obtained by improper influences, before he passes upon their admissibility. It is the duty of the judge to hear all such competent evidence on this preliminary question as the defendant may see fit to offer. This is true though the officer or other person called to the stand by the State may deny that any improper influences were used. Whart. Crim. Ev. sec. 289; *People v. Soto*, 49 Cal. 69. Since a defendant is a competent witness, under our statutes, in his own favor, he is a competent witness on this preliminary issue. This, indeed, is the legitimate deduction to be drawn from what we said in the recent case of *State v. Rush*, 95 Mo. 199.

It follows that the judge erred in refusing to hear the evidence offered on this preliminary issue. The fact that this question was, in the end, submitted to the jury does not cure the error. Even should the judge find that the confessions were made with such freedom as to allow them to go to the jury, still the circumstances under which they were alleged to have been made, could be put in evidence to the end that the jury may determine what weight they will give to them; but whether the confessions shall be admitted at all or not is a question for the judge, and not the jury, to determine.

The judgment is therefore reversed and the cause remanded. RAY, J., absent, the other judges concur.

PEOPLE V. FOX.

121 N. Y. 449—June 3, 1890.

O'BRIEN, J.: The defendant was convicted in the court of sessions of Fulton County of the crime of robbery in the first degree, charged to have been committed upon the person of one Plank by entering his house in the night time, binding him and taking certain money which it is claimed he had in his possession. Plank was the principal, if not the only witness at the trial who testified in regard to the facts and circumstances constituting the offense and who attempted to identify the defendant as one of the persons present on the occasion and actively participating in the robbery. He testified that there were four other persons present with him, but did not attempt to identify them by any direct or positive testimony. His version of the transaction tending to establish the commission of a crime and to identify the defendant as one of the persons engaged in it, is not free from contradictions, and contains some elements of improbability.

While the credibility of his testimony was entirely for the jury, its salient features can properly be kept in view when considering the competency and probable effect with the jury of certain confessions of guilt claimed to have been made by the defendant, and which were given in evidence against him, as well as evidence offered in his behalf tending to explain or entirely destroy these alleged confessions.

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The defendant, at the time of his arrest, was found in a saloon at night and taken to the lock-up in a state of intoxication, from which he had not recovered, when, about two o'clock in the morning, he was aroused from sleep by a justice of the peace, who presented to him a paper just prepared by the justice and the district attorney, which was read to the defendant, signed by his mark and sworn to before the justice. The paper was given in evidence at the trial by the prosecution, and in it the defendant states, in the technical language of an indictment, that he and four other persons named therein committed the robbery. The testimony of Plank was in this way corroborated, not only as to the commission of a crime, but as to the identity of the defendant as one of its perpetrators, in concert with the four other persons named in the confession. The defendant offered to prove by three of the four persons named in the paper, and by other witnesses, that on the night when the robbery was alleged to have taken place, they were not and could not have been at Plank's house or in the vicinity, but were, in fact, at another place. Like proof was offered to show that the fourth person named in the paper as the defendant's accomplice could not possibly have been present or participating in the commission of the offense. This testimony was objected to by the district attorney on the ground that, though it might prove that the four persons named in the paper as defendant's accomplices, who were not on trial, did not participate in the crime, yet it could not affect the admission of the defendant that he was himself an actor in the transaction. The court sustained the objection and the defendant excepted.

The case made by the people was that five persons were engaged in the commission of the offense, one of whom was identified as the defendant. In view of the testimony given by Plank, and the whole theory of the prosecution to assume that the robbery was committed by the defendant alone, or in concert with persons other than those named in the paper, would destroy all effect to which it might otherwise be entitled as a confession of guilt. If it could be established to the satisfaction of the jury that the defendant's statement, as evidenced by the paper, in regard to the presence and guilty connection of these four persons with the commission of the offense was false, that would tend to destroy the credit to which it might otherwise be entitled. While it was entirely possible that the defendant may have committed the crime in concert with four other persons not named in the paper, yet he had the right to prove, if he could, that important parts, at least, of the confession were not entitled to any credit with the jury, especially as he was indicted jointly with three of the persons described in the confession as his confederates. The peculiar circumstances under which the defendant's signature was obtained to the paper tended greatly to impair its value as evidence against him, and had he been permitted to submit to the jury the proof which he offered to produce, they might very well have rejected the entire confession as unreliable. The testimony tended to impeach the force and effect of written admissions of guilt obtained from the defendant when he was in a condition in which he would not be likely to understand

it, and under circumstances that tended to deprive it of the character of a voluntary statement, and was, therefore, admissible.

When the paper above referred to was offered in evidence the defendant's counsel offered, before it was received, to show that it was obtained from the defendant under a promise of immunity from punishment for robbery, or for some other crime for which he then stood charged. The court decided, notwithstanding this offer, to receive the paper in evidence, and rejected the proof offered by the defendant until the case was with the defense, stating that it would then be stricken out if proved to have been procured under the circumstances embraced in the offer. The defendant's counsel excepted to this ruling. The competency of the writing as evidence against the defendant was a question of law which he had a right to ask the court to decide before the evidence was admitted. It frequently happens that the testimony is of such a character as to require the court to submit the question to the jury, to be rejected by them altogether or given such weight as under all the circumstances the jury may deem proper to give to the alleged confession. But when, as in this case, a written confession of guilt is offered against a person on trial for a criminal offense, and he objects to the same and offers to prove to the court that it was procured from him by threats, or promises, or under such circumstances as would render it incompetent as evidence, it is error to receive the paper without first hearing the proof offered and deciding upon the competency of the confession as evidence against the party making it. (*Commonwealth v. Culver*, 126 Mass. 464.)

When the paper in question was read to the jury, under the sanction of the court, without first hearing what the defendant had to allege against its competency, he was to that extent denied a fair trial, though the paper was received conditionally with the understanding that it should be stricken out of the case if it afterwards was shown to be incompetent.

There were some other rulings at the trial contained in the record, of which the defendant complains, that it would be difficult to sustain, but as they may be changed upon another trial it is unnecessary to notice them here. The proceedings at the trial have been referred to sufficiently to show that the conviction was properly reversed by the court below.

The judgment should be affirmed.

All concur, EARL, J., concurring on first ground, GRAY, J., not voting. Judgment affirmed.

*A later New Jersey case.*—In *State v. Young*, 67 N. J. L. 223, 51 Atl. Rep. 939, decided in 1902, in speaking of confessions, the court said:

"To render admissible in evidence such a statement, it must be shown to have been made voluntarily, and the burden to show that it was thus made is upon the State. An admissible statement is one that is voluntary in the sense that it has not been induced by the pressure of fear, or the influence of hope of some benefit to be derived therefrom in respect to the prosecution for the alleged crime. Whether the statement is voluntary in this sense is to be preliminarily determined

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by the trial court upon evidence adduced by the State, and by the accused, if he offers any, and the question before that court is a mixed question of law and fact. The duty of the trial court is to find what facts are established to its satisfaction by the evidence adduced in the preliminary examination, and to apply the law thereto, and thereon determine whether or not the confession or statement has been shown to have been voluntary in the sense in which the word is applicable to such confessions or statements. If the facts found have evidence to support them, and the law applied is unobjectionable, an exception to a ruling admitting such confession or statement in evidence will not be reviewable on an ordinary writ of error."

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PRICE v. STATE.

114 Ga. 855—40 S. E. Rep. 1015.

Decided Mar. 11, 1902.

CONFESSIONS: \* *Preliminary inquiry—Voluntary confession—Instructions—Reasonable doubt.*

1. Where, in the trial of a criminal case, a witness is offered by the State to prove confessions of guilt made by the accused immediately after the latter had been given into his custody by the arresting officer, and the testimony of the witness shows that the confessions were made to him freely and voluntarily, it is not incumbent on the judge to require the State to call and examine the arresting officer to ascertain if he used any threats or offered any inducements to the accused while the latter was in his custody. *Dawson v. State*, 59 Ga. 333; *Dumas v. State*, 63 Ga. 600; *Irby v. State*, 95 Ga. 467, 20 S. E. 218.
2. Where the accused, when arrested by an officer, stated to the latter that, if he would conduct the accused safely to jail, the latter would make a statement, and the officer replied that he would endeavor to conduct the accused safely whether he made a statement or not, and thereupon the accused made a confession, the confession was not, for this reason, inadmissible. If the confession was induced by hope, the inducement was not held out by the officer, but proceeded from the accused himself. *Bohanan v. State*, 18 S. E. 302, 92 Ga. 32; *Minton v. State*, 25 S. E. 626, 99 Ga. 254; *Hecox v. State*, 31 S. E. 592, 105 Ga. 625.
3. It was not error to charge the jury to the effect that it is the duty of the court to determine primarily the admissibility of alleged confessions, but that its judgment is not conclusive upon the jury, and it is for the jury at last to determine whether such a confession was made, and whether it was freely and voluntarily made. *Dawson v. State*, *supra*; *Irby v. State*, *supra*.

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\*See CONFESSION in Table of Topics.



4. It is not error for the court to refuse a request to charge that confessions of guilt should be rejected by the jury unless the State had showed beyond a reasonable doubt that they were made voluntarily, and without being induced by another by the slightest hope of benefit or remotest fear of injury. *Carr v. State*, 10 S. E. 626, 84 Ga. 250; *Thomas v. State*, 10 S. E. 1016, 84 Ga. 613; *Nix v. State*, 22 S. E. 975, 97 Ga. 212.
5. It is not error to refuse requests to charge to the effect that each and every juror should believe for himself that the accused has been shown to be guilty beyond a reasonable doubt before he agrees to a verdict of guilty, and that, if any member of the jury has such a reasonable doubt, he should not agree to a verdict of guilty. *Smith v. State*, 63 Ga. 170 (20); *Fogarty v. State*, 5 S. E. 782, 80 Ga. 455. See, also, 62 Alb. Law J. 314, and 41 Am. Law Reg. (N. S.) 56.
6. While, in a criminal case, every material allegation in the indictment should be proven beyond a reasonable doubt, it is not error to refuse to charge that "all the phases of the case which in law are required to be proven should be proven beyond a reasonable doubt."
7. It is not error to charge that, "It is the duty of the jury to reconcile the testimony of the witnesses . . . so as to impute perjury to no witness," where the context shows that the charge meant that the jury should do so if they could.
8. Under the facts shown there was no error in refusing to charge upon the law of manslaughter or of any other grade of homicide less than murder.
9. The evidence fully warranted the verdict, and the trial judge did not err in refusing a new trial.  
(Syllabus by the Court.)

Error from the Superior Court, Bibb County; Hon. W. H. Felton, Jr. Judge.

Arthur Price, convicted of a crime, brings error. Affirmed.

*B. N. Davis* and *Henry W. Lane*, for the plaintiff in error.  
*William Brunson*, Solicitor General, and *Brykin Wright*, Attorney General, for the State.

Per Curiam. Judgment affirmed.

LITTLE, J., absent on account of sickness.

CONFESSION

1. Before found guilty of the crime.
2. In a case where the prisoner was found guilty of the crime against the State.

Error  
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## BINES v. STATE.

118 Ga. 320—45 S. E. Rep. 376.

Decided Aug. 11, 1903.

CONFESSIONS:\* CORPUS DELICTI: *The corpus delicti cannot be proven by a confession—Insufficient proof of corpus delicti.*

1. Before a person charged with a particular crime can be lawfully found guilty thereof, it is necessary to establish the *corpus delicti*. This cannot be done by the mere extrajudicial confession of the accused. There must be *alunde* proof of the *corpus delicti*.
2. In a criminal trial, evidence that the accused, while confined in prison, upon being interrogated as to his conduct upon a certain occasion, stated that he had intended to attempt to overpower the jailor and effect his escape, is admissible as a circumstance against him.

(Syllabus by the Court.)

Error to Superior Court, Effingham County; Hon. B. D. Evans, Judge.

Higman Bines, convicted of arson, brings error. Reversed.

*J. H. Smith*, for the plaintiff in error.

*Livingston Kenan*, Solicitor General, for the State.

FISH, P. J. The plaintiff in error was found guilty of the crime of arson, and, upon his motion for a new trial being overruled, he excepted. The motion for a new trial was based upon the general grounds upon alleged newly-discovered evidence, and alleged error in overruling a motion to rule out certain evidence introduced by the State. Briefly stated, the evidence upon which the accused was found guilty was substantially as follows: The barn which he was charged to have feloniously burned was in the town of Marlow, belonged to J. F. McEachern, contained corn, hay, fodder, cotton seed hulls, and rice flour, and was discovered to be on fire shortly before or shortly after midnight. At the time of the fire, and for a considerable period of time before, the accused was in the employment of the owner of the barn, working as a general helper around the owner's home and little farm, and feeding his horse and cattle. The keys to

\*See CONFESSION in Table of Topics.

the barn had been kept hanging in the hall of McEachern's residence, and the accused generally had had free access to them, and carried them to and from the barn; but a short time before the fire occurred McEachern had moved to Jacksonville, and left these keys in charge of Mr. Yandall, a boarder, who was living in the residence, and he had carried them from then until the fire, in order to see that the barn was always locked and nothing taken from it. After Yandall took the keys and saw to the feeding of the stock, the accused seemed to Yandall, from his appearance and demeanor, to be mad. The accused lived, according to some of the witnesses, about a quarter of a mile from the barn, and according to others about half a mile therefrom. When the fire was discovered, an alarm was raised, a gun being fired several times, and there being a good deal of hallooing. The accused did not come to the fire that night, but made his appearance at the scene the next morning, and assisted in putting out the smoldering embers. Upon being then asked why he did not come to the fire, he said he never gave it a thought. Several other people lived in the same immediate neighborhood as the accused, and none of them came to the fire. The accused and a number of others, on the night of the fire, attended meeting at a church about half a mile below Marlow, and the people left the church after the 10 o'clock train had passed, and the defendant, in company with some of his neighbors, went in the direction of his home. One of the State's witnesses testified that he lived within one hundred feet of the defendant's house, and that after he left the church he went to his home, and went to sleep, and did not wake up until the next morning. A witness named Anna Duncan testified that she lived right across the street from the house of the accused; that on the night of the fire she went to bed after she got through her work, and some time in the night her son came and awakened her, and she let him in the house; that in a few minutes after her son came in and went to bed she heard the accused rattling a chain against the door, and, after the chain rattled, she heard a small whistle, which she thought ought to be the defendant's whistle; that she recognized his whistle, for she knew "he has that low whistle ever since his mother has been dead." On the morning after the fire the accused was heard

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to say that he "didn't reckon there would be any more hell raised about the keys now." On the day after the fire, Mrs. McEachern said to the defendant that, if he had been at the church on the previous night, he would have seen the fire, and asked him if he saw the fire "last night," and he replied, "No, ma'am; I went home and went to bed." He also said to her little daughter: "You know the book you gave me. I read it a while, and went right to bed." The jailer testified that while the accused was in jail he went in there to give him his breakfast, and "he played off asleep or crazy;" that the accused was lying down with his head against the wall of the cell. The witness called him, and he did not answer, and the witness kicked the wall to awaken him, and still got no response, and then went out into the corridor, and saw that the accused was watching every movement that he made. The witness went out and stayed a good while, and came back, and found the accused up; questioned and talked to him a good deal about it; and the accused then said "his intention was to make his escape some way or other, as he could;" that if he could have gotten the jailer in his cell he was going to get out and have a little combat with him and make his escape. A witness named Barney Jackson testified that he lived in Savannah, and was sent up to Marlow as a detective; that he found out where the accused lived, and went to his house one night about 9 or 10 o'clock—had never met him before—and told him he would like to get a place to stay if he could, and asked the accused if he could take him in for the night; that the accused told him that he could not, as he was looking for some one to come over there, but if the witness would go off, and come back latter he (the accused) would be "more than apt to let him stay over with him;" that the witness did not go back there that night, but went back the next morning about 10 o'clock; found the accused building a fence, and, after some considerable conversation with him, told the accused that his (Jackson's) home was in Montgomery, Ala., and that he had to make his escape from there, and when the accused asked him what for, he said, "Some white folks who I had been working for owed me seventeen or eighteen dollars, and I had to set the stable on fire, with two or three horses;" and then the accused said he was working for Mr. McEachern

and used to handle the keys; that the lady let him handle them; and he used to have a good thing, but finally she took the keys away from him; and that he, about a month before this conversation, after the crowd at the church had disappeared, concealed himself, and went over to Mr. McEachern's barn and set it on fire. The accused introduced no evidence. In his statement to the jury he said he was at the church "that night," and when the "church was out" went home, and knew nothing about the fire until the next morning about 6 o'clock. He did not deny anything the witnesses had testified.

1. It seems to us very clear from this evidence that the accused was unlawfully convicted. The evidence is insufficient to support a verdict of guilty. There was no proof whatever of the *corpus delicti*, except the confession of the accused, made to a negro detective, upon a few hours' acquaintance, and under circumstances which rendered the story told by this witness not very plausible. The jury, however, believed the testimony of this witness to be true, and therefore we are to take the confession as having been proved. Before there can be a lawful conviction of a crime, the *corpus delicti*—that is, that the crime charged has been committed by some one—must be proved. The mere confession of the accused is not sufficient to establish the *corpus delicti*. This rule is well established, in this county at least; and our own case of *Murray v. State*, 43 Ga. 256, is, so far as this court is concerned, controlling authority to this effect. In that case the accused was charged with having feloniously burned a ginhouse. He confessed that he "put fire to it about 1 o'clock at night," and the State proved that the house was consumed by fire about the hour of 1 o'clock at night, and that the defendant resided about a mile from the spot. It was held that under the section of the Code which declares that "a confession alone, uncorroborated by other evidence, will not justify a conviction," the evidence was insufficient to sustain a verdict of guilty. Judge McCay said: "There is, as we understand it, really nothing here but the confession. There is not even the *corpus delicti*, since there is no evidence that the ginhouse was not accidentally burned." The great weight of authority in this country is that, before a confession will authorize a conviction, it must be corroborated by evidence which, inde-

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pendently of the confession, tends to establish the *corpus delicti*. Some of the courts hold that the *corpus delicti* must be proved by evidence, other that the confession, beyond a reasonable doubt. Others hold that when the confession is supported by other evidence, which in and of itself tends to establish that the particular crime charged has been committed by somebody, the *corpus delicti* is sufficiently established. Wills, an eminent English author, in his work on Circumstantial Evidence (chapter 3, § 6), says: "By the law of England, a voluntary and unsuspected confession is clearly sufficient to warrant a conviction, wherever there is independent proof of the *corpus delicti*. According to some authorities, confessions alone is a sufficient ground for conviction, even in the absence of any such independent evidence; but the contrary opinion is most in accordance with the general principles of reason and justice, the opinions of the best writers on criminal jurisprudence, and the practice of other enlightened nations. Nor are the cases adduced in support of the doctrine in question very decisive, since in all of them there appears to have been some evidence, though slight, of confirmatory circumstances, independently of the confession." Clark, in his work on Criminal Procedure (page 532), lays the rule down thus: "An extrajudicial confession, in order to warrant a conviction, must be corroborated by other evidence tending to prove the *corpus delicti*." Wharton, after stating the conditions upon which voluntary confessions are admissible, says: "While voluntary confessions of specific charges or of inculpatory facts are always admissible under the conditions above stated, they cannot sustain a conviction, unless there be corroborative proof of the *corpus delicti*." Whart. Crim. Ev., § 632. In 1 Greenleaf on Evidence, § 217, in discussing the question whether extrajudicial confessions, uncorroborated by any other proof of the *corpus delicti*, are sufficient to support a conviction, the learned author says: "In each of the English cases usually cited in favor of the sufficiency of this evidence there was some corroborative circumstance. In the United States the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient for his conviction; and this opinion certainly best accords with the humanity of the Criminal Code, and with the great degree of

caution applied in receiving and weighing evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law." In *People v. Badgley*, 16 Wend. 53, it was held: "Evidence of confession alone, unsupported by corroborating facts and circumstances, is not sufficient to convict. There must be proof aliunde of the *corpus delicti*, although such proof need not be conclusive." In *Stringfellow v. State*, 26 Miss. 157, 59 Am. Dec. 247, it was held: "In capital felonies, the extrajudicial confessions of the prisoner, where the *corpus delicti* is not proven by independent testimony, are insufficient to warrant a conviction of the accused." In *Johnson v. State*, 59 Ala. 37, following *Matthews v. State*, 55 Ala. 187, it was held: "An extrajudicial confession, not corroborated by independent evidence of the *corpus delicti*, will not support a conviction of felony." In Kentucky this principle is embodied in the statutory law of the State. *Cunningham v. Commonwealth*, 9 Bush, 149. This seems to be true also in Iowa. *State v. Feltes*, 51 Iowa, 501, 1 N. W. Rep. 755. In *United States v. Mayfield* (C. C.), 59 Fed. Rep. 118, Boardman, J., said: "Before a conviction is justified, the Government should be required to establish the *corpus delicti* by some degree of circumstantial or other evidence independent of the defendant's extrajudicial confessions." In *Priest v. State*, 10 Neb. 394, 6 N. W. Rep. 468, the rule was laid down this way: "A confession is not sufficient evidence of the *corpus delicti*. There must be other evidence that a crime has actually been committed, the confession being used to connect the accused with the crime." In *State v. German*, 54 Mo. 527, 14 Am. Rep. 481, it was held that a conviction was not warranted when there was no other proof of the *corpus delicti* but the uncorroborated extrajudicial confession of the accused. And in *State v. Scott*, 39 Mo. 424, where the accused was tried under an indictment for robbery, and the evidence showed that he was seen riding in company with an old man, and had declared that he intended to get into a fuss with the old man and take his horse from him, and afterwards the accused was seen riding the horse, and said he got into a fuss with the old man and took his horse, it was held that the evidence was insufficient to sustain a conviction, because there was no corroborative testimony that a crime had

been committed. The accused was accused was showed that tory proof of which h related to his sold for le *delicti*, or had to be s circumstan charged. attempt to was not su Lane, 49 State, 91 court itself sustain the of the bur jury could felonious. ently of t the verdict principle ently of th sideration, there is n fact that night did one. Upon accidental supra. S upon mer with pecu inflammab fact, testi his appea longer all show that on a par v



been committed. In *Tyner v. State*, 5 Humph. 383, where the accused was convicted of horse stealing upon evidence which showed that his conduct was such as to be strong and satisfactory proof that he had committed some crime, the consequences of which he was endeavoring to escape, and which probably related to his possession and sale of the horse—which he hastily sold for less than half its value—it was held that the *corpus delicti*, or fact that the particular crime had been committed, had to be shown before any inference could be made from these circumstances that he had committed the particular crime charged. It was held in Michigan that in a prosecution for an attempt to murder, the unsupported confession of the accused was not sufficient evidence of the *corpus delicti*. *People v. Lane*, 49 Mich. 340, 13 N. W. Rep. 622. In *Westbrook v. State*, 91 Ga. 11, 16 S. E. Rep. 100—a headnote case—this court itself, in passing upon the sufficiency of the evidence to sustain the verdict of guilty, said: "There was direct evidence of the burning, and circumstantial evidence from which the jury could rightly infer that the fire was not accidental, but felonious. Thus the *corpus delicti* was established independently of the confession. The evidence was ample to warrant the verdict." This seems to be a distinct recognition of the principle that the *corpus delicti* must be established independently of the confession of the accused. In the case under consideration, if the confession of the accused be eliminated, there is no evidence at all of the *corpus delicti*. The mere fact that the barn was discovered to be on fire about midnight did not even tend to show that the fire was a felonious one. Upon such proof the law presumes the fire to have been accidental. *Phillips v. State*, 29 Ga. 105; *Murray v. State*, *supra*. Such would have been the presumption in any case upon mere proof of the burning, and the presumption applies with peculiar force to the burning of a house filled with such inflammable material as this barn contained. Surely the mere fact, testified to by one witness, that the accused seemed, from his appearance and demeanor, to be mad because he was no longer allowed to carry the keys of the barn, did not tend to show that the fire was of incendiary origin. This evidence was on a par with that to which Judge McCay alluded in *Murray's*



*Case*, when he said: "The looks of the prisoner, and his apparent unwillingness to talk with the witness, as mentioned by him, is evidence so liable to misconstruction as to be of hardly any weight." The remark of the accused, the morning after the fire, that he "didn't reckon there would be any more hell raised about the keys now," while tending, in some slight degree, to cast suspicion upon him, can hardly be said, when considered apart from his confession, as tending to establish as a fact that the house was felonious burned. If he was mad because he had been deprived of the privilege of carrying the keys of the barn, he would have been just as likely—perhaps more so—to have made this remark if the fire had been purely accidental. The fact—if it can be said to have been established as a fact—that he was heard, at some undisclosed hour of the night when the fire occurred, rattling a chain and whistling in the low whistle he had had since his mother died, at the door of a neighbor, who lived just across the street from him, just after that neighbor's son had come into the house to go to bed, simply tended to show that he had left the church which he had attended that night, and was then almost at his own home, a quarter or a half of a mile from the barn, and no more tended to show that he had set fire to the barn than it did that this neighbor's son had done so. If he had been on his way to set fire to the barn, he would hardly have stopped to arouse his neighbors. His statement to the jailer that he had intended to attempt to overpower him and escape from the jail was, in view of his previous confession, only a slight circumstance against him. He might well desire to escape, not because he had really committed the crime with which he was charged, but in order to avoid the consequences of his confession. If considered by the jury as an incriminating circumstance, it was simply in the nature of an indirect admission of guilt, from which no inference of guilt could be drawn until the *corpus delicti* was proved. Its probative value in establishing the *corpus delicti* was certainly not as great as a positive confession that he had committed the identical crime charged; and even two positive confessions of guilt, without independent proof of the *corpus delicti*, would not be sufficient to authorize a conviction. The conversation which occurred between him and Mrs. McEachern cer-

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tainly had no probative value so far as proving the *corpus delicti* was concerned.

2. In one of the grounds of the motion for a new trial it is alleged that the court erred in overruling a motion to rule out the testimony of the jailer, the purport of which is indicated above. There was no error in the ruling complained of. It was competent for the State to prove what the accused stated to the jailer. Upon the trial of a criminal case it is always competent for the State to prove that after the alleged offense was committed the accused fled, or sought to conceal himself, or attempted, after arrest, to escape; and certainly evidence showing an intention to escape from the custody of the law is admissible. In *Whaley v. State*, 11 Ga. 123, it was held that evidence that the accused offered to bribe one of his guards in order to effect his escape was admissible, and the evidence in this case of the statement made by the accused of his purpose to escape from the jail was equally so.

As the plaintiff in error is granted a new trial, it is not necessary to consider the ground of the motion in reference to alleged newly-discovered evidence.

Judgment reversed. All the justices concur, except TURNER, J., not presiding.

NOTES—NECESSITY OF PROVING THE CORPUS DELICTI BY EVIDENCE, OTHER THAN CONFESSIONS; ILLUSTRATED BY SEVERAL REMARKABLE CASES (by J. F. G.)

"I would never convict any person of murder or manslaughter," said Sir Matthew Hale, 2 Pleas of the Crown, 290, "unless the fact were proved to be done, or at least the body found dead, for the sake of two cases, one mentioned by my Lord Coke, P. C., cap. 104, p. 1232, a *Warwickshire case*.

"Another that happened in my remembrance in Staffordshire, where A. was long missing, and upon strong presumptions B. was supposed to have murdered him, and to have consumed him to ashes in an oven, that he should not be found, whereupon B. was indicted of murder, and convicted and executed, and within one year after A. returned, being indeed sent beyond the sea by B. against his will, and so, though B. justly deserved death, yet he was really not guilty of that offense, for which he suffered."

*The Warwickshire Case.*—From a note in Hale's Pleas of the Crown, 290, he evidently refers to a case reported in 3 Coke's Institutes, 332, and cited in Roscoe's Criminal Evidence, and 14 Howell's State Trials, 1310. Lord Coke gives the case in the language of the following paragraph:

In the County of Warwick there were two brethren, the one having issue a daughter, and being seised of lands in fee devised the government of his daughter and his lands, until she came to her age of sixteen years, to his brother, and died. The uncle brought up his niece very well both at her book and needle, etc., and she was about eight or nine years of age: her uncle for some offense correcting her, she was heard to say, "Oh good uncle, kill me not." After which time the child, after much inquiry, could not be heard of; whereupon the uncle being suspected of the murder of her, the rather for that he was her next heir, was upon examination *anno 8 Jac. regis* committed to the gaol for suspicion of murder, and was admonished by the justices of assize to find out the child, and thereupon bailed him until the next assizes. Against which time, for that he could not find her, and fearing what would fall out against him, took another child as like unto her both in person and years as he could find, and appareled her like unto his true child, and brought her to the next assizes, but upon review and examination, she was found not to be the true child; and upon these presumptions he was indicted and found guilty, had judgment, and was hanged. But the truth of the case was, that the child being beaten over night, the next morning when she should go to school, ran away into the next county, an being well educated was received and entertained of a stranger; and when she was sixteen years old, at what time she should come to her land, she came to demand it, and was directly proved to be the true child. Which case we have reported for a double caveat: first, to judges, that they in case of life judge not too hastily upon bare presumption; and secondly, to the innocent and true man, that he never seek to excuse himself by false or undue means, lest thereby he offending God (the author of truth) overthrow himself, as the uncle did.

*An anonymous case.*—In section 683 of American Criminal Law, 6th Ed., Mr. Wharton says: "Mathews relates an instance of a countryman who was convicted on his own confession of the murder of a widow, who, two years afterwards, returned to her home, and had never received any injury whatever."

*"Case of the Perrys."*—14 Howell's State Trials, 1311-1323 (cited in Wigmore on Evidence, sec. 866, note.) The case may be briefly stated as follows: On Thursday, August 16, 1660, William Harrison, who was steward for the lady viscountess Campden at Campden Gloucestershire, being about seventy years of age, and having been in the service of the same family for fifty years, walked to Charringworth about two miles, to receive his lady's rent, but did not return as usual. Late in the evening Mrs. Harrison sent her servant, John Perry, to meet his master; but neither of them returned that night. Perry returned early the next morning. Upon investigation it was ascertained that Mr. Harrison had collected a small amount of rent and then started home. His hat band and comb were found, the former bloody and the latter hacked. John Perry, upon being questioned, gave a detailed account of his doings that day, which was corroborated by several persons; but after being in custody several days (part of the time in prison and part of the time at an inn), being pressed to confess, to some he said that Mr. Harrison had been killed by a

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tinker; to others, that a gentleman servant had murdered him; and to others that he was murdered and hid in the bean-rick. Search was made but no body found. At his own suggestion he was again brought before the magistrate on August 24th, and said that Joan Perry, his mother, and Richard, his brother, had murdered Mr. Harrison. He gave a detailed statement of the supposed crime in which he said that Mr. Harrison was strangled to death. The next day the mother and brother were brought in his presence, they denying the accusation and he reaffirming it. Upon leaving the magistrate's office, Richard, in taking a clout from his pocket, "dropped a ball of inkle," in which was found a slip knot, which John then identified as the cord used in strangling Mr. Harrison. John also stated that a certain burglary by which £140 was taken from Mr. Harrison's house the year before was committed by Richard; and that he, John, was accessory to it. He also mentioned that certain conduct of his, in which he pretended to flee from armed men in that vicinity, was simply to prevent suspicion from resting upon him after the burglary. At the next assizes, the mother and both brothers were indicted for burglary, and also for murder. To the first indictment they all pleaded guilty, being advised to do so. They begged pardon and "act of oblivion" which was granted. At the next assizes they pleaded not guilty to the charge of murder, John with the others denying the charge. He stated that he was mad at the time he made the confession and knew not what he said. They were all convicted, sentenced and hanged. The mother was reputed to be a witch; and it was thought that she had bewitched her sons, to that degree, that they would not confess while she was alive; so she would hang first; but the two sons died protesting innocence. Several years afterward Mr. Harrison returned home. In a written statement he said that he had been kidnapped and carried beyond the sea; and for a while was a slave in Turkey; but that when his master died he escaped, and finally succeeded in returning to England. His statement was doubted by some; but there was no reason to doubt his identity.

For brief mention of this case see Roscoe's Cr. Ev. 29, and 1 Leach, 299.

The case is also given in Famous Cases of Circumstantial Evidence; as is also, *The Case of the Boorns*; but as some have doubted the authenticity of that book, from the fact that the author omitted to give his authority for the cases reported, we have not relied upon it for any of the cases referred to in this volume.

*The case of Captain Green and his Crew, who were tried at the High Court of Admiralty of Scotland March 14-16, 1705 for piracy, murder and robbery.*—5 Hargrave's State Trials, 571-610; 14 Howell's State Trials, 1199-1307;—Turning from the lengthy account of this famous historic trial, it is sufficient at this time to remark that though the alleged crime was not committed the verdict was largely based on the testimony of several of the crew, and was followed by several confessions; and to refer the reader to a speech by Duncan Forbes, Lord Advocate of Scotland, before the House of Commons June 9, 1737 (10 Cobbett's Parliamentary History of England, 283), in which, while speaking of the case, he says:

"One Green, a master of an English vessel, having been forced by stress of weather in the harbour Leith, a report was spread that he was a pirate; upon which he and his officers were taken up, tried, and upon the evidence of some of his crew, no two of which concurred in their evidence, condemned for murdering one Drummond, and seizing his ship. I was present at the whole trial, and was sensible with what partiality and injustice it was carried on; the unfortunate men seemed to me to have no other crime but that of being Englishmen, and of being obliged to put in to Scotland at a time when great animosities were subsisting in that kingdom on account of some proceeding against the natives of Scotland, which were judged there to be unjust and harsh. For those, and no other crimes, this poor unfortunate gentleman, and the officers of his ship, were to suffer an ignominious death. The populace in the mean time begun to have a surmise that the privy council, which sat that time in Edinburgh, intended to relieve the criminals. As every surmise to an enraged mob is a proof, they attacked the lord-chancellor, beat his chair in pieces, and obliged him to fly for his life; and had it not been for the city guard, who rescued him with their bayonets upon the muzzles of their guns, they had torn him to pieces. They afterwards went and knocked at the door of the house where the privy council was sitting, bawling out for the blood of these persons; and the privy council, in a mean and scandalous manner, gratified them by signing an order for their execution that very day. I was so struck with the horror of the fact, that I put myself in deep mourning, and with the danger of my life attended the innocent but unfortunate men to the scaffold, where they died with the most affecting protestations of their innocence. I did not stop here, for I carried the head of Captain Green to the grave; and in a few months after letters came from the captain for whose murder, and from the very ship for whose capture the unfortunate persons suffered, informing their friends that they were all safe. These letters, sir, were of a date much later than the time when the crimes, for which Green was condemned, were pretended to be perpetrated."

*The Case of the Trailors.*—This case was briefly referred to by Mr. Wharton in section 683, American Criminal Law, 6th Edition. He regarded it as a well authenticated case. He cites as his authority, 4 Western Law Journal, 25. The case appeared in the Western Law Journal, October, 1846 (and in Chicago Daily Law Bulletin, Dec. 14, 1904), in the following form:

#### REMARKABLE CASE OF ARREST FOR MURDER.

(From the Quincy (Ill.), Whig, of April 9, 1846.)

The following narrative has been handed us for publication by a member of the Bar. There is no doubt of the truth of every fact stated; and the whole affair is of so extraordinary a character as to entitle it to publication, and commend it to the attention of those at present engaged in discussing reforms in criminal jurisprudence, and the abolition of capital punishment.

"In the year of 1841, there resided, at different points in the State of Illinois, three brothers by the name of Traylor. Their Christian

names were Springfield was a sob age; a cor in business of like reti it on a far field in a ilar habits field somet direction. borhood of years, a m of fifty; h lodged a v little jobs an impres amount of William f and Sprin dence at buggy wit residence, Monday of them on bald, wen lodgings Trailors a purpose o At supper some inqu professed coming in able to d after bre at noon, Henry ex their hom about the vicinity, iam had garded, time, the very litt siderable turned t search f them an it was a was yet the Post

names were William, Henry and Archibald. Archibald resided at Springfield, then as now the seat of government of the State. He was a sober, retiring and industrious man, of about thirty years of age; a carpenter by trade, and a bachelor, boarding with his partner in business—a Mr. Myers. Henry, a year or two older, was a man of like retiring and industrious habits; had a family, and resided with it on a farm, at Clary's Grove, about twenty miles distant from Springfield in a north-westerly direction. William, still older, and with similar habits, resided on a farm in Warren county, distant from Springfield something more than a hundred miles in the same north-westerly direction. He was a widower, with several children. In the neighborhood of William's residence, there was, and had been for several years, a man by the name of Fisher, who was somewhat above the age of fifty; had no family, and no settled home, but who boarded and lodged a while here and a while there, with persons for whom he did little jobs of work. His habits were remarkably economical, so that an impression got about that he had accumulated a considerable amount of money. In the latter part of May, in the year mentioned, William formed the purpose of visiting his brothers at Clary's Grove and Springfield; and Fisher, at the time having his temporary residence at his house, resolved to accompany him. They set out in a buggy with a single horse. On Sunday evening they reached Henry's residence, and staid over night. On Monday morning, being the first Monday of June, they started on to Springfield, Henry accompanying them on horseback. They reached the town about noon, met Archibald, went with him to his boarding house, and there took up their lodgings for the time they should remain. After dinner, the three Trailors and Fisher left the boarding house in company, for the avowed purpose of spending the evening together in looking about the town. At supper, the Trailors had all returned, but Fisher was missing, and some inquiry was made about him. After supper, the Trailors went out professedly in search of him. One by one they returned, the last coming in after late tea time, and each stating that he had been unable to discover anything of Fisher. The next day, both before and after breakfast, they went professedly in search again, and returned at noon, still unsuccessful. Dinner again being had, William and Henry expressed a determination to give up the search, and start for their homes. This was remonstrated against by some of the boarders about the house, on the ground that Fisher was somewhere in the vicinity, and would be left without any conveyance, as he and William had come in the same buggy. The remonstrance was disregarded, and they departed for their homes respectively. Up to this time, the knowledge of Fisher's mysterious disappearance had spread very little beyond the few boarders at Myers', and excited no considerable interest. After the lapse of three or four days, Henry returned to Springfield, for the ostensible purpose of making further search for Fisher. Procuring some of the boarders, he, together with them and Archibald, spent another day in ineffectual search, when it was again abandoned, and he returned home. No general interest was yet excited. On the Friday week after Fisher's disappearance, the Postmaster at Springfield received a letter from the Postmaster



nearest William's residence, in Warren county, stating that William had returned home without Fisher, and was saying, rather boastfully, that Fisher was dead, and had willed him his money, and that he got about fifteen hundred dollars by it. The letter further stated that William's story and conduct seemed strange, and desired the postmaster at Springfield to ascertain and write what was the truth in the matter. The postmaster at Springfield made the letter public, and at once, excitement became universal and intense. Springfield, at that time, had a population of about 3,500, with a city organization. The attorney general of the State resided there. A purpose was forthwith formed to ferret out the mystery, in putting which into execution, the mayor of the city and the attorney-general took the lead. To make search for, and, if possible, find the body of the man supposed to be murdered, was resolved on as the first step. In pursuance of this, men were formed into large parties, and marched abreast, in all directions, so as to let no inch of ground in the vicinity remain unsearched. Examinations were made of cellars, wells and pits of all descriptions, where it was thought possible the body might be concealed. All the fresh, or tolerably fresh graves at the graveyard, were pried into, and dead horses and dead dogs were disinterred, where, in some instances, they had been buried by their partial masters. This search, as has appeared, commenced on Friday. It continued until Saturday afternoon without success, when it was determined to despatch officers to arrest William and Henry at their residences respectively. The officers started on Sunday morning. Meanwhile, the search for the body was continued, and rumors got afloat of the Trallors having passed, at different times and places, several gold pieces, which were readily supposed to have belonged to Fisher. On Monday, the officers sent for Henry, having arrested him, arrived with him. The mayor and attorney-general took charge of him, and set their wits to work to elicit a discovery from him. He denied, and denied, and persisted in denying. They still plied him in every conceivable way, till Wednesday, when, protesting his own innocence, he stated that his brothers, William and Archibald, had murdered Fisher; that they had killed him, without his (Henry's) knowledge at the time, and made a temporary concealment of his body; that, immediately preceding his and William's departure from Springfield for home, on Tuesday, the day after Fisher's disappearance, William and Archibald communicated the fact to him, and engaged his assistance in making a permanent concealment of the body; that, at the time he and William left professedly for home, they did not take the road directly, but, meandering their way through the streets, entered the woods at the northwest of the city, two or three hundred yards to the right of where the road they should have traveled, entered them; that, penetrating the woods some few hundred yards, they halted, and Archibald came a somewhat different route, on foot, and joined them; that William and Archibald then stationed him (Henry) on an old and disused road that ran near by, as a sentinel, to give warning of the approach of any intruder; that William and Archibald then removed the buggy to the edge of a dense brush thicket, about forty yards distant from his

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(Henry's) position, where, leaving the buggy, they entered the thicket, and in a few minutes returned with the body, and placed it in the buggy; that from his station he could and did distinctly see that the object placed in the buggy was a dead man, of the general appearance and size of Fisher; that William and Archibald then moved off with the buggy in the direction of Hickox's mill pond, and after an absence of half an hour, returned, saying they had put him in a safe place; that Archibald then left for town, and he and William found their way to the road, and made for their homes. At this disclosure, all lingering credulity was broken down, and excitement rose to an almost inconceivable height. Up to this time, the well known character of Archibald had repelled and put down all suspicions as to him. Till then, those who were ready to swear that a murder had been committed, were almost as confident that Archibald had had no part in it. But now, he was seized and thrown into jail; and indeed, his personal security rendered it by no means objectionable to him. And now came the search for the brush thicket, and the search of the mill pond. The thicket was found, and the buggy tracks at the point indicated. At a point within the thicket, the signs of a struggle were discovered, and a trail from thence to the buggy track was traced. In attempting to follow the track of the buggy from the thicket, it was found to proceed in the direction of the mill pond, but could not be traced all the way. At the pond, however, it was found that a buggy had been backed down to, and partially into the water's edge. Search was now to be made in the pond; and it was made in every imaginable way. Hundreds and hundreds were engaged in raking, fishing and draining. After much fruitless effort in this way, on Thursday morning the mill dam was cut down, and the water of the pond partially drawn off, and the same processes of search again gone through with. About noon of this day, the officers sent for William, returned, having him in custody; and a man calling himself Dr. Gilmore, came in company with them. It seems that the officer arrested William at his own house, early in the day on Tuesday, and started to Springfield with him; that after dark awhile, they reached Lewiston, in Fulton County, where they stopped for the night; that late in the night this Dr. Gilmore arrived, stating that Fisher was alive at his house, and that he had followed on to give the information, so that William might be released without further trouble; that the officer, distrusting Dr. Gilmore, refused to release William, but brought him on to Springfield, and the doctor accompanied them. On reaching Springfield, the doctor reasserted that Fisher was alive and at his house. At this, the multitude for a time was utterly confounded. Gilmore's story was communicated to Henry Traylor, who, without faltering, reaffirmed his own story about Fisher's murder. Henry's adherence to his own story was communicated to the crowd, and at once the idea started, and became nearly, if not quite universal, that Gilmore was a confederate of the Trailors, and had invented the tale he was telling, to secure their release and escape. Excitement was again at its zenith. About three o'clock the same evening, Myers, Archibald's partner, started with a two-horse carriage, for the purpose of ascertaining whether Fisher was alive, as stated by Gilmore, and if so, of bringing him back to

Springfield with him. On Friday a legal examination was gone into before two justices, on the charge of murder against William and Archibald. Henry was introduced as a witness by the prosecution, and on oath reaffirmed his statements, as heretofore detailed, and at the end of which he bore a thorough and rigid cross-examination without faltering or exposure. The prosecution also proved by a respectable lady, that on the Monday evening of Fisher's disappearance, she saw Archibald, whom she well knew, and another man whom she did not know, but whom she believed at the time of testifying to be William (then present), and still another, answering the description of Fisher, all enter the timber at the northwest of town (the point indicated by Henry), and after one or two hours, saw William and Archibald return without Fisher. Several other witnesses testified, that on Tuesday, at the time William and Henry professedly gave up the search for Fisher's body, and started for home, they did not take the road directly, but did go into the woods, as stated by Henry. By others, also, it was proved, that since Fisher's disappearance, William and Archibald had passed rather an unusual number of gold pieces. The statements heretofore made about the thicket, the signs of a struggle, the buggy tracks, etc., were fully proven by numerous witnesses. At this the prosecution rested. Dr. Gilmore was then introduced by the defendants. He stated that he resided in Warren county, about seven miles distant from William's residence; that on the morning of William's arrest, he was out from home, and heard of the arrest, and of its being on the charge of the murder of Fisher; that on returning to his own house, he found Fisher there; that Fisher was in very feeble health, and could give no rational accounts as to where he had been during his absence; that he (Gilmore) then started in pursuit of the officer, as before stated; and that he should have taken Fisher with him, only that the state of his health did not permit. Gilmore also stated that he had known Fisher for several years, and that he had understood he was subject to temporary derangement of mind, owing to an injury about his head received in early life. There was about Dr. Gilmore so much of the air and manner of truth, that his statement prevailed in the minds of the audience and of the court. The Trailors were discharged, although they attempted no explanation of the circumstances proven by the other witnesses. On the next Monday, Myers arrived in Springfield, bringing with him the now famed Fisher, in full life and proper person. Thus ended this strange affair; and while it is readily conceived that a writer of novels could bring a story to a more perfect climax, it may well be doubted whether a stranger affair ever occurred.

"Much of the matter remains in mystery to this day. The going into the woods with Fisher, and returning without him, by the Trailors; their going into the woods at the same place the next day, after they professed to have given up the search; the signs of a struggle in the thicket, the buggy tracks at the edge of it, and the location of the thicket, and the signs about it, corresponding precisely with Henry's story, are circumstances that have never been explained.

"William and Archibald have both died since—William in less than

a year, and Henry is

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a year, and Archibald in about two years after the supposed murder. Henry is still living, but never speaks of the subject.

"It is not the object of the writer of this to enter into the many curious speculations that might be indulged upon the facts of this narrative, yet he can scarcely forbear a remark upon what would almost certainly have been the fate of William and Archibald, had Fisher not been found alive. It seems he had wandered away in mental derangement, and, had he died in this condition, and his body been found in the vicinity, it is difficult to conceive what could have saved the Trallors from the consequence of having murdered him. Or, if he had died, and his body never found, the case against them would have been quite as bad; for, although it is a principle of law that a conviction for murder shall not be had unless the body of the deceased shall be discovered, it is to be remembered that Henry testified that he saw Fisher's dead body."

*The Case of the Boorns.*—Greenleaf, Wharton, and other authors refer to this as a well authenticated case. Greenleaf says that there is a report of it in the library of the Harvard University, while Wharton cites 5 Law Reporter, 195 (193), as his authority. The catalogue of the Chicago Law Institute Library lists a report of the case published at Rutland in 1820; which we have been unable to find in the library. The report of it in the 5 Law Reporter, 193, published at Boston in 1842, and later republished in the 29 National Corporation Reporter (p. 633), is as follows:

#### THE CASE OF THE BOORNS.

It is a common reproach against the legal profession that advocates undertake the defense of criminals whom they know to be guilty. An unsuccessful defense is viewed as conclusive evidence that it should not have been undertaken; and a successful one as an unwarrantable prostitution of talents to a bad cause; as a wrong done to society under the sanction of law. In either case, the community has prejudged the prisoner and demanded his punishment, often upon a very slight knowledge of the facts. The successful advocate is sometimes regarded as a bad citizen, whose energies have been directed to breaking the bars of a tiger's cage, and causing the remorseless savage a little longer to pursue its depredations. In any event, the profession are often stigmatized as the "indiscriminate defenders of right and wrong by the indiscriminate utterance of truth or falsehood."

In thus uncharitably condemning the Bar, it is illogically supposed that because a person is convicted, no good man should have undertaken to defend him; or because he has committed a crime, that he ought to be convicted on his trial.

Neither of these positions is true. No lawyer is bound to know or to care, as a lawyer, whether his client is innocent or guilty. The mere conviction of an indicted criminal does not answer the ends of justice, but his conviction according to the forms and principles of law. It is not the evidence which satisfies public opinion that ought to condemn a man, but that which, submitted to the prescribed tests, will satisfy a jury. All stories have two sides. The prisoner's coun-

sel gives the prisoner's side, and the Government's counsel that of the public. Every man has secured to him a fair and impartial trial. It would be neither fair nor impartial if only one side of the case were heard, and all the efforts directed against the prisoner. The solemn proceedings of courts of justice would be worse than mockery, if forms were to be set aside and principles disregarded, even when the prisoner's guilt is written in letters of light.

The public are as much concerned that convictions shall be had only according to law, as they are that crime shall be punished. Lynch law dispenses summary justice. Acting upon sudden impulse, with certain and often correct opinions of guilt, not seldom seizing its victim *flagrante delicto*, it deals its terrific blows with unerring aim. No defense avails, no ingenious pleadings, no captivating eloquence turns aside its awful vengeance. Though its code is written in blood, though humanity is shocked by the terrific vindictiveness and appalling suddenness of its visitations, yet it has sometimes eradicated evils; terminated systematic crime and reformed communities grovelling in wickedness, as the thundergust purifies the air. But who justifies the practitioners under this code? Whose veins are not chilled by the thought, that this dark and remorseless demon may find sustenance in all parts of our land? Yet our courts would be only the sanctioned tribunals of the monster, if prisoners were convicted before them in disregard of those forms and principles of law, created and preserved as well for the protection of the innocent as the punishment of the guilty.

It is the advocate's high duty to the public to see that forms and principles are observed. That if his client is convicted, he is convicted according to law. That he is slaughtered only by the legal axe, wielded by legal hands.

In most cases the advocate cannot know, but can only suspect the prisoner's guilt. No code of morals requires suspicion to produce the results of certainty. Even confessions are not always conclusive evidence of guilt; for these have been made sometimes under mistaken notions of their effect; sometimes with sinister design; sometimes by the influence of fanatical preachers, who, under the cloak of religion, conceal the barbarity of inquisitors. The law presumes every man innocent till *proved* to be guilty. They who most loudly condemn the profession adopt the opposite of the maxim. They require the lawyer to "usurp the functions of the judge," and superciliously to assume the infallibility of his own determination. To disregard the merciful rule, that doubts weigh in favor of the accused, and practically to condemn by refusing to assist him. Even should a lawyer actually know the guilt of his client, that knowledge should affect only the mode in which he conducts the defense. We do not assent to Lord Brougham's doctrine, that an advocate is bound to defend his client "by all expedient means"—"to protect him at all hazard and cost to all others"—to disregard "the alarm, the suffering, the torment, the destruction which he may bring upon all others." We do not defend the practice of attacking the character of innocent witnesses to destroy the force of their testimony. Nor do we apologize for the counsel's course on the trial of Courvoisier. But we do say, that Mr.

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Phillips was justified in defending that wretched culprit, that the public might be justly satisfied that he was condemned by the principles of law, and not by the impulse of prejudice and passion.

In many capital trials the skeleton of the case mentioned at the head of this article is raised, like the ghost of a murdered man, to scare the jury. As prisoners have been sometimes erroneously convicted and even executed upon circumstantial evidence, a common course of argument in capital defenses is to expatiate upon the danger of relying upon such evidence. Several cases reported in the books are always thrown at the jury in one grand and final discharge. Like the shot from a battery of Paixhans, if no other damage is done, they burst with terrific noise and envelope the case in a great cloud of "reasonable doubts." The trial of the Boorns is frequently used for this purpose. A detail of the facts may interest the general reader, and prove the truth of the foregoing remarks.

On the 19th of May, 1813, Stephen and Jesse Boorn, with Russell Colvin and Lewis Colvin, his son, were seen in the morning by a neighbor, one Thomas Johnson, in Manchester, Vermont, picking up stones in a field. They were seemingly in a quarrel. Johnson had a full view of them, but was concealed from their sight. In the course of the quarrel, according to the testimony of Lewis, Colvin first struck Stephen, who then knocked the former down with a club. The blow brought no blood. Lewis ran off, and neither he nor Johnson saw Colvin again.

The sudden departure of Colvin excited at the time some inquiry as to what had become of him. As he was, however, in the habit of mysteriously absenting himself, sometimes for months together, being occasionally in a state of mental derangement, it was supposed by his friends and neighbors that he would shortly return. They were, however, some vague suspicions that this time he had been murdered. They arose from the fact of the quarrel, and from contradictory declarations by the Boorns in regard to his disappearance or death. Many witnesses subsequently, on the trial, testified to these contradictions, as well as to singular observations made by the Boorns in relation to the affair. Amongst other things, Stephen told Mr. and Mrs. Baldwin, four years after Colvin's disappearance, that the latter went off in a strange manner into the woods, at the time he (Stephen), Colvin and Lewis were picking stones; that Lewis had gone for a drink, and when he (Baldwin) asked them *where* Colvin was gone, one replied "Gone to hell;" the other, "that they had put him where potatoes would not freeze."

These circumstances were not deemed sufficient, however, to warrant their arrest. They both remained unmolested in the village until 1818, when Stephen removed to Denmark, in New York, making a visit to Manchester in the winter of 1818-19.

Probably these men would never have been brought to trial, if an uncle of theirs had not, sometime in 1819, dreamed that Colvin came to his bedside and declared that he had been murdered, and that the uncle must follow the ghost, who would lead him to the spot where the body lay. This dream being repeated three times, was finally at-

tended to. Search was made in the place indicated, being where a house had formerly stood. Under the house was a hole about four feet square, made for the purpose of burying potatoes, but filled up at the time of the search. The pit was opened and only a large knife, a penknife, and a button found in it. Mrs. Colvin accurately described these articles previously to their being shown to her; and having seen them, declared the large knife and the button to have belonged to her husband.

This wonderful dream, as near as we can learn, took place in April, 1819. It created a great sensation in the neighborhood, and was deemed by many as a providential interference for the detection of the murdered. Immediate search was thereupon made for the body of Colvin, concerning whose murder by the Boorns no doubt now existed.

Toward the end of April, 1819, on the strength of this dream, Jesse Boorn was arrested in Manchester. His examination was commenced on the 27th of April, during which day, as well as on the three following, search was unsuccessfully made for the body of Colvin. The ghost had played them false. It was not to be found in the pit indicated, nor in any other place ingenuity could assign. Still, so strong was popular belief in the honesty of their mysterious informant, that no one questioned his truth. Two pieces of bone were found in a hollow stump, which were pronounced to be the nails of a human toe—a cluster of bones was found in the same place. Several physicians thought them human—only one thought otherwise. In order to determine this matter conclusively, they dug up a leg, which had been amputated from a man about four years previously, and upon comparing the two sets of bones, it was unanimously determined that the set first found did not belong to the human race.

But people would not admit the fallibility of their ghost, especially as the bones first found were discovered by the agency of a dog, in the most approved mode of canine sagacity. It was therefore surmised, that the body had been burnt, and some parts not consumed cast into the stump and other bones put amongst them for deception. This surmise gained strength from the fact that shortly after the disappearance of Colvin, a barn belonging to the dreamer was accidentally consumed by fire, and about the same time a log heap was burnt by the Boorns *near the place where the ghost said the body was to be found.*

Upon the examination of Jesse, the magistrate allowed none of this stuff to be given in evidence. The facts relied on were, the disappearance and continued absence of Colvin, the quarrel, and the contradictions and observations before alluded to. These circumstances were deemed insufficient to warrant his detention. He was accordingly on the eve of being discharged when he stated to some of the myrmidons of the gaol, "that the first time he had an idea that his brother Stephen had murdered Colvin, was when he was here last winter; he then stated that he and Russell were hoeing in the Glazier lot; that there was a quarrel between them; that Colvin attempted to run away; that he struck him with a club or stone on the back part

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of his head or neck, and had fractured his skull, and supposed he was dead. That he could not tell what had become of the body." He mentioned many places where it might be found. Search was accordingly made, but to no purpose.

A warrant was immediately issued for the apprehension of Stephen, who was committed to gaol on the 15th of May. He strongly asserted his innocence, and was severe upon Jesse for making the confession. The latter, after an interview with Stephen, retracted all he had said, declaring the whole to be false. They were, however, committed to take their trial before the Supreme Court of Vermont, to be holden in Manchester, in September, 1819.

During the time of their imprisonment, before the trial, they were frequently visited by a clergyman. "They evinced no contrition," but persisted in solemnly declaring their innocence. At length, in October, 1819, they were brought to trial, but such was the excitement against them that it was difficult to get a panel, almost every one in the vicinity having expressed his opinion against the prisoners.

Upon the trial, in addition to the facts already stated, it appeared that some children had found upon the land where the quarrel had taken place, and brought home, an old, mouldy, rotten hat, recognized as having belonged to the murdered man. That both Jesse and Stephen had, in 1815, told Mrs. Colvin, who was their sister, that she might swear a child with which she was then pregnant, Stephen at the same time saying that he knew Colvin was dead. The most remarkable evidence adduced was the CONFESSION of Jesse, and the FULL, CIRCUMSTANTIAL, WRITTEN AND SIGNED CONFESSION of Stephen, that he had quarreled with Colvin, and murdered and buried him.

It was testified by the gaoler that he exhorted Jesse to confess, but to confess only the truth, because a falsehood would increase his trouble. Thereupon Jesse "*confessed*" that he was afraid Stephen had murdered Colvin, and that he believed he knew very near where the body was buried. When the knife and hat of Colvin were shown him, he appeared much agitated.

The confession of Jesse to another witness was still more extraordinary and unaccountable. Every person believed him guilty. Each one who had access to him, urged him to admit his guilt. "Much was said to Jesse to get the facts from him. He was told that if he would confess the facts, it would probably be the means of clearing him. It appeared in evidence that several had promised to sign for their pardon if they would confess; at the same time telling them that there was no doubt they would be convicted upon the testimony that was then against them." These inducements were eminently successful. Jesse, by means of them, was made to say that "Stephen knocked Colvin down twice, broke his skull, and the blood gushed out,—my father came up there several times and asked if he was dead, and said 'damn him.' All three of us took the body and put it into the cellar, *where father cut his throat*. I knew the jack-knife to be Colvin's. Stephen wore Colvin's shoes. About a year and a half after we took up the bones, put them under a barn that was burnt, then pounded them up and flung them into the river. *Father put some of them into a stump.*



Stephen's confession is so extraordinary that we insert it verbatim:

May the 10th, 1812, (1) I, about 9 or 10 o'clock, went down to David Glazier's bridge and fished, down below Uncle Nathaniel Boorn's, and then went up across their farms, where Lewis and Russell was, being the nighest way, and set down and began to talk, and Russell told me how many dollars benefit he had been to father, and I told him he was a damned fool; and he was mad, and jumped up, and we sat down close together, and I told him to sit down, you little tory; and there was a piece of beech limb about two feet long, and he caught it up and struck at my head as I sat down; and I jumped up, and it struck me on one shoulder, and I caught it out of his hand, and struck him a back-handed blow, I being on the north side of him; and there was a knot on it about one inch long. As I struck him, I did think I hit him on his back; and he stooped down; and that knot was broken off sharp, and it hit him on the back of the neck, close in his hair; and it went in about half of an inch on that great cord; and he fell down; and then I told the boy to go down, and come up with his uncle John; and he asked me if I had killed Russell, and I told him no, but he must not tell we struck one another. And I told him when he got away down, Russell was gone away; and I went back and he was dead; and then I went and took him and put him in the corner of the fence by the cellar hole, and put briars over him and went home, and went down to the barn and got some boards, and when it was dark I went down and took a hoe and boards and dug a grave as well as I could, and took out of his pocket a little Barlow knife, with about half of a blade, and cut some bushes, and put on his face and the boards, and put in the grave and put him in, four boards on the bottom and on the top, and t'other two on the sides, and then covered him up, and went home, crying along, but I warn't afraid as I know on. And when I lived to William Boorn's I planted some potatoes; and when I dug them I went there, and something I thought had been there, and I took up his bones and put them in a basket, and took the boards and put on my potatoe hole, took the basket and my hoe, and went down and pulled up a plank in the stable floor, and then dug a hole, and then covered him up, and went into the house and told them I had done with the basket; and took back the shovel, and covered up my potatoes that evening. And then, when I lived under the West mountain, Lewis came and told me that father's barn was burnt up; the next day, or the next day but one, I came down and went to the barn, and there was a few bones; and when they was to dinner, I told them I did not want any dinner, and went and took them, and they warn't only a few of the biggest of the bones, and threwed them in the river above Wyman's, and then went back, and it was done quick too, and then was hungry by that time, and then went home, and the next Sunday I came down after money to pay the boot that I gave to boot between oxens; and went out there and scraped up them little things that was under the stump there, and

<sup>1</sup> The date "May the 10th, 1812," would seem to be an error; as the alteration is said to have occurred on May 10, 1813. Perhaps the lapse of 6 or 7 years left the prisoner's mind uncertain as to dates.—(J. F. G.)

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told them I was going to fishing, and went, and there was a hole, and I dropped them in, and kicked over the stuff, and that is the first anybody knew it, either friends or foes, even my wife. All these I acknowledge before the world.

Manchester, August 27, 1819.

STEPHEN BOORN.

The body of Colvin was not found, nor anything approaching nearer to it than the toe nails. Presumption was piled upon presumption to make out a case, it being first presumed that somebody was murdered, that the somebody was Colvin, and finally that the Boorns were the culprits. Confessions were made and then retracted, and others made contradicting each other. Yet upon this evidence the jury, after a trial occupying five days, a "short, judicious and impressive charge" from Mr. Justice Doolittle, and a "lengthy and appropriate one" from Mr. Chief Justice Chase, rendered a verdict of guilty against both the prisoners. They were accordingly sentenced to be executed on the 28th of January, 1820.

So much distress was manifested by these men upon learning their fate, that the usual reaction almost immediately took place in the public mind. Notwithstanding their confessions they now vehemently asserted their innocence. A petition was presented to the legislature for a commutation of punishment, which was granted to Jesse, but refused to Stephen. The former was accordingly carried to the State prison on the 29th of October. Stephen remained in the "inner dungeon" of the gaol with "heavy chains on his hands and legs, being also chained to the floor." During his confinement his agony is described as extreme. He was unwilling to die, both on his own and his family's account, and vehemently protested his entire innocence.

Let it be observed that the excitement of the village was very great. No man doubted the guilt of the prisoners. Many believed that the murderers had been detected by providential interposition. Their confessions, not very well agreeing, it is true, were the main reliance of the prosecution, and caused their conviction. The confession of Stephen was introduced *by his counsel* after it had been offered by the Government and ruled out by the court, to explain oral evidence relating to the facts it contained. The counsel was represented to have made an earnest, eloquent and learned defense. The trial was very laborious, occupying five days, during which fifty witnesses were examined. Under these circumstances, of course, the profession came in for its usual share of censure. Why should these gentlemen undertake to defend criminals, concerning whose guilt there could be no "reasonable doubt?" Above all, how could any honest man assume to defend Stephen, with the written confession before him, unless he were an "indiscriminate defender of right and wrong, by the indiscriminate utterances of truth or falsehood?"

Whatever may have been public opinion on their conviction, it was shortly changed, for on the 22d of December, 1818, (1) *the murdered man was brought alive to Manchester!* The reaction in favor of the Boorns was now excessive. Stephen, sentenced to be hung, was released amidst the congratulations of the crowd and the peal of artillery. Jesse,

(1) 1819: as appears in an earlier report of the case.

then at hard labor in the State prison, was forced to wait the slower process of a regular discharge. Both became the heroes of the moment, and enjoyed, as a slight recompense for their months of agony, the sympathy of their former persecutors.

It appeared that when Colvin left his native town, he went to Dover, in New Jersey, and resided in a state of harmless mental derangement in the family of a Mr. Polhamus, during the whole time of his absence. The brother-in-law of Mr. Polhamus, a Mr. Chadwick, who lived at a distance of forty miles from Dover, seeing an account of the trial of the Boorns in the Evening Post, which paper he was not in the habit of reading, and had *taken up at that time by the merest apparent accident*, had an idea that the resident in Mr. P.'s house was the man for whose supposed murder the Boorns were indicted.

Under this impression he published a letter, in which, as we suppose—for we have never seen the letter nor any intimation of its contents—he stated his suspicions that his brother-in-law's guest was the supposed murdered man. This suspicion was communicated to a Mr. Whelply, of New York, formerly of Manchester, and well acquainted with Colvin. Mr. Whelply went to New Jersey in quest of Colvin, and being convinced of his identity brought him to Manchester. Thus, by what may be considered almost a direct interposition of Divine Providence, two innocent men were restored to society; and, at least in one instance, it was satisfactorily proved, that lawyers may undertake the defense of "atrocious criminals" against the clearest conviction of the people, with truth, honesty and justice on their side.

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#### STATE V. JAGGERS.

58 S. C. 41—36 S. E. Rep. 434.

Decided June 19, 1900.

#### DYING DECLARATIONS: \* *Improper evidence in reply as to threats.*

1. Deceased was shot between 9 and 10 o'clock a. m. Between 3 and 4 p. m., same day, he made a written statement, at that time, manifesting no concern (apparently easy under the influence of an opiate). About ten or fifteen minutes after being shot he said that "he was shot and shot bad," and didn't expect to get over it. *Held*, that this did not show that he was apprehensive of immediate death at the time his statement was taken; neither did his saying some five or six hours later that he had no hope, he living till noon next day.
2. The fact that defendant had offered evidence to show hostility of deceased towards him and threats at various times, did not justify the State in giving in reply, evidence of specific threats by defendant, there being nothing in the evidence for the defense to which such evidence could be a reply.

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\*See DYING DECLARATIONS in Table of Topics.

Appeal  
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Jas. F.  
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Appeal from the York County Circuit Court: Hon. O. W. Buchanan, Judge.

William Jagers, being convicted of murder, appeals. Reversed.

*Jas. F. and J. R. Hart*, for the appellant.

*Solicitor Henry*, for the State.

McIVER, C. J. The defendant was indicted for the murder of one George Burris, and was found guilty, with a recommendation to mercy. The defendant appeals upon the several exceptions set out in the record, which raise but two questions: (1) Whether there was error in receiving certain statements made by the deceased as dying declarations; (2) whether the Circuit Court erred in admitting the testimony of one Wilson, offered in reply by the State, tending to show that the defendant had made threats against the deceased.

First, as to the admissibility of the so-called dying declarations: For a proper understanding of this question, it will be necessary to make the following statement, gathered from the "case," as prepared for argument here, as well as from the supplemental testimony embraced in the argument of the solicitor, which was consented to by counsel for appellant, provided they be allowed twenty days in which to submit "additional testimony and further argument," of which proviso, however, the appellant's counsel have not availed themselves. It seems that the deceased was shot on the morning of the 3d of October, 1899, between 9 and 10 o'clock; and the witness Cato Williams, who found him some ten or fifteen minutes after he was shot, lying in the yard, near the well, heard him say that "he was shot, and shot bad." This witness, in the supplemental testimony embraced in the argument of the solicitor, is represented as saying that he saw the deceased again that afternoon at his house, about 3 or 4 o'clock, and, when asked whether George (the deceased) said anything about dying, replied: "He never said anything to me about dying, except at the well. He said he was shot, and did not expect to live. He said he was shot bad, and didn't expect to get over it." This manifestly refers to what the witness heard the deceased say in the morning at

the well, a very short time after he was shot; for he adds to his testimony just quoted the following: "And the other, at home, I don't know anything about that." The next witness offered to prove the alleged dying declarations was C. H. Sandifer, a magistrate, who reduced the statement of deceased to writing. This witness testified that he was in company with the sheriff about 3 or 4 o'clock in the afternoon of the day on which deceased was shot, and found him sleeping under the influence of opiates. "We waked him up—shook him"—and then he made the statement in question. But, when examined as to whether the deceased was conscious of his condition, he testified as follows: "Q. The boy, George, said nothing to you about whether he was going to die or not? A. No, I told him that he could make it [referring to the statement] if he wished; that he might die; that, if he had any statement to make, to make it now. Q. You told him he might die? A. Yes, sir. Q. He didn't say whether he was going to die or not? A. No, sir; he didn't say. Q. You say he was under the influence of morphine at the time? A. Seemed so. He was breathing pretty heavy, and seemed resting. Q. Didn't seem concerned about himself? A. No, sir; we had to shake him to keep him awake. Q. But he didn't seem to manifest any concern about himself—whether he would get well or not? A. No; he seemed to be perfectly easy." It seems that another witness (J. N. Gillespie) had previously testified that he had seen the deceased in the morning after he was shot, and when asked if deceased had said anything about dying, replied: "Yes, sir; he just told me he had no hope of himself." But, there being some doubt as to the time when the deceased made this statement, the witness Gillespie was recalled, when he said that this statement was made to him by the deceased after dark, about 9 or 10 o'clock at night of the day deceased was shot; and that the deceased lived until about 12 o'clock the next day.

The rules in regard to the admissibility of dying declarations are well settled: (1) That death must be imminent at the time the declarations in question are made; (2) that the declarant must be so fully aware of this as to be without any hope of life; (3) that the subject of the charge must be the death of the declarant, and the circumstances of the death must be the sub-

ject of the charge. E. Rep. followed in 13 S. E. E. Rep. met in the did not o any evide nothing t larations ninent a rather, te quietly— up and a drank a in eviden ing to sh doctor, w examined whether shows. that he r could do way indi contrary to be cor shake hi fest any not? A is not s tended sufficient This wi the decee and, wh the decee and sho [the de anything

ject of the declarations. *State v. Johnson*, 26 S. C. 153, 1 S. E. Rep. 510, and the cases therein cited, recognized and followed in the subsequent cases of *State v. Bradley*, 34 S. C. 139, 13 S. E. Rep. 315, and *Same v. Banister*, 35 S. C. 295, 14 S. E. Rep. 678. Now, while the third of these requirements was met in this case, and possibly the first, also, although the death did not occur until the next day, yet we are unable to discover any evidence that the second requirement was met; for there is nothing to show that the deceased, at the time he made the declarations in question, was so fully aware that his death was imminent as to have lost all hope of recovery, but the testimony, rather, tends to show the contrary. The deceased was sleeping quietly—"he seemed to be perfectly easy"—and, when roused up and asked if he did not want some milk, sat up in bed and drank a glass of milk, and then made the declarations admitted in evidence. He certainly said nothing and did nothing tending to show that he was conscious of impending death. The doctor, who had seen him and given him some powders, was not examined as to his condition, nor asked his opinion as to whether death was imminent, so far as the record before us shows. Even when told by the witness who took the statement that he might die, and if he wished to make any statement he could do so, the deceased expressed no apprehension, and in no way indicated that he was uneasy about his condition. On the contrary, when the witness was asked whether deceased seemed to be concerned about himself, he replied: "No, sir; we had to shake him to keep him awake. Q. But he didn't seem to manifest any concern about himself—whether he would get well or not? A. No; he seemed to be perfectly easy." This certainly is not such evidence as the rule contemplates. But it is contended that the testimony of Cato Williams, copied above, is sufficient to show that deceased had lost all hope of recovery. This witness seems to have been the first person who reached the deceased after he was shot—a very few minutes afterwards; and, when first asked what the deceased said, did not say that the deceased said anything about dying, only said "he was shot, and shot bad." Subsequently, when asked: "Q. Did George [the deceased] say anything about dying? A. He never said anything to me about dying, except at the well. He said he was



shot, and didn't expect to live. He said he was shot bad, and didn't expect to get over it. And the other, at home, I don't know anything about that." This conversation between the witness and the deceased, thus amplified beyond his first statement of such conversation manifestly occurred at the well, but a very short time after the deceased was shot down, and several hours before the deceased was removed to his home; and while it may be true that, under the excitement of the moment, he may have used the language last attributed to him by the witness, indicating that he then feared that the shot would prove fatal, yet, several hours afterwards, when he had been removed to his house, and seemed to be resting "perfectly easy," it does not at all follow that he still entertained the same apprehensions. On the contrary, the witness who took the statement offered in evidence says that he did not then seem to manifest any concern about himself, which he undoubtedly would have done if he then supposed that death was imminent. Again, it is said that his declaration to the witness Gillespie that "he had no hope of himself" shows that he was conscious of his condition; but it is manifest that such declaration was made some four or five hours after the witness Sandifer took down the statement offered in evidence, and it might well be that he had then lost hope of himself, though it is far from showing that he had lost hope when he made the statement to Sandifer, several hours before. It is true that Gillispie, when first on the stand, did testify that the statement made to him was before Sandifer had seen the deceased; but, when recalled to the stand for the purpose of explaining when it was that he heard deceased say that he had no hope of himself, he not only says that it was after Sandifer had seen the deceased, but fixes the time specifically, as after dark (about 9 or 10 o'clock at night), which was some four or five hours after the statement was made to Sandifer about 3 or 4 o'clock in the afternoon. Now, in view of the fact that dying declarations constitute one of the exceptions of the rule rejecting hearsay evidence (1 Greenl. Ev., § 156), and in view of the following language in section 158 of the same volume, "It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense

of impending death, and the witness S

The second testimony tending to show that the deceased was not by defendant to any testimony overruled argument of the sole to which sense, be of the record contradicted nowhere in his regard to had rested showing, him [the various testimony also, to be examined Wilson testimony George strings of had been chief, witness contradicted it was not. It certainly tant tendency him (the side; for made the the deceased any way



of impending death," it seems to us that there was error in receiving in evidence the statement taken down in writing by the witness Sandifer as the dying declaration of the deceased.

The second question is whether there was error in receiving the testimony of one Wilson, when offered in reply by the State, tending to show that defendant had made threats against the deceased prior to the homicide. This testimony was objected to by defendant's counsel upon the ground that it was not in reply to any testimony offered for the defense, but the objection was overruled. It does not appear in the "case," as prepared for argument here, or from the supplement found in the argument of the solicitor, that the defendant had offered any testimony to which the testimony of the witness Wilson could, in any sense, be regarded as a reply. Nor does it appear in any part of the record before us that the testimony of Wilson tended to contradict anything testified to by the defendant. Indeed, it nowhere appears that defendant was ever examined as a witness in his own behalf. All that we can find in the "case" in regard to threats is the following statement: "After the State had rested its case, the defendant introduced his testimony, showing, among other things, that deceased was unfriendly to him [the accused], and had made threats to do him injury at various times before the homicide. The State, in reply, offered, also, to prove threats made by the accused, and for this purpose examined Steve Wilson"—followed by the testimony of said Wilson to the effect that the accused had said, "When I meet George [the deceased] again, I am going to shoot his heart strings out." This testimony, while, no doubt, competent if it had been offered by the State when developing its testimony in chief, when the defendant would have had an opportunity to contradict or explain it, was clearly incompetent in reply; for it was not in reply to any testimony adduced by the defendant. It certainly was not in reply to the testimony offered by the defendant tending to show that the deceased had made threats to do him (the defendant) injury at various times before the homicide; for it might be perfectly true that each of the parties had made threats against the other, and the fact, if fact it be, that the deceased had made threats against the defendant did not in any way tend to show that the defendant had or had not made

threats against the deceased. The testimony of Wilson was clearly incompetent when offered by the State in reply, and upon this ground also there should be a new trial.

The judgment of this court is, that the judgment of the Circuit Court be reversed and the case be remanded to that court for a new trial.

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STATE V. CARTER.

107 La. 792—32 So. Rep. 183.

Decided May 12, 1902.

DYING DECLARATIONS: \* *Murder.*

A dying declaration must go in as a whole, and is not rendered inadmissible because some of its statements of themselves, and if standing alone, would be inadmissible.

(Syllabus by the Court.)

Appeal from the Parish of Lafourche, Twentieth Judicial District; Caillouet, Judge.

Willie Carter, convicted of murder, appeals. Affirmed.

*John S. Billiu*, for the appellant.

*Walter Guion*, Attorney General, and *Whitnell P. Martin*, District Attorney (*Lewis Guion*, of counsel), for the State.

PROVOSTY, J. The accused was convicted of murder, and sentenced to be hung. No one has appeared for him in this court, and no brief has been filed in his behalf. The only thing we find in the record calling for our attention is a bill of exceptions reserved to the action of the trial court in admitting in evidence the dying declaration of the deceased. Certain statements contained in this dying declaration are pointed out as being inadmissible in evidence because not relating to the immediate circumstances of the killing, and on account of these objectionable statements the dying declaration is objected to as a whole. This is the second time that this same dying declaration has been objected to on this same ground. On the previous occasion we disposed of the matter briefly, as follows: "A

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\*See DYING DECLARATIONS in Table of Topics.

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written dying declaration is not inadmissible because sworn to; nor because some of its statements of themselves, and if standing alone, would not fall within the rule admitting dying declarations. The declaration must go in as a whole." *State v. Trivas*, 32 La. Ann. 1086, 36 Am. Rep. 293. We see no reason for changing this ruling. The dying declaration is a peculiar species of evidence admitted *ex necessitate*, in flagrant violation of all the ordinary rules of evidence. It violates the rule against hearsay; it has not the sanction of an oath; it cuts off the opportunity for cross-examination; it rides roughshod over the sacred constitutional right of an accused to be confronted with the witness against him. To all these grievous faults it may add the adherent infirmity of emanating from impaired faculties, benumbed already, or disordered by the panic of momentary death. All these objections are overborne by the one consideration of public policy that society may not be deprived of the evidence such as it is, and whatever it may be worth. After all this, is the declaration to be excluded simply because the dying man has wandered off to some matters not pertaining to the immediate circumstances of the killing? Verily, if the law so decided, it would have strained at a gnat after swallowing a camel. Where a dying declaration, otherwise admissible, happens to contain some extraneous matter, there is presented a choice between three courses: First, of admitting it in its entirety, such as it is; second, of eliminating the objectionable parts; and third, of excluding it. The first course would violate the rule by which dying declarations must be confined to the circumstances of the killing; the second would violate the rule by which dying declarations must go in as a whole; the third would deprive society of the benefit of the declaration, after, for the sake of its admission, sacrifice had been made of such precious inheritances as the right of cross-examination and confrontation with witnesses. Under these circumstances our ruling was that the declaration should go in, and we adhere to the ruling. Better let the declaration go in as a whole, such as it happens to be, with appropriate instructions from the court, rather than open the door to the dangerous process of revising or editing it, by which the sense of it might, in particular cases, be destroyed or distorted. The rule against

fragmentary declarations has been established in the interest of the accused.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

Rehearing refused.

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STATE V. FRAZIER.

109 La. 458—33 So. Rep. 561.

Decided Jan. 19, 1903.

DYING DECLARATIONS,\* of an infant.

Before a child 10 years old can be heard as a witness, proper ground must be laid as to his or her competency, and the same rule applies when the dying declaration of a child of that age is offered in evidence; but in a case where no objection was made to the declaration on that ground, and where a large number of witnesses were heard, whose testimony has not been brought up, this court will assume that the predicate was laid.

(Syllabus by the Court.)

Appeal from the Orleans Parish Criminal District Court; Hon. Joshua G. Baker, Judge.

Harriet Baker, being convicted of manslaughter, appeals. Affirmed.

*Jeremiah J. Foley* and *Jas. T. Nix*, for the appellant.

*Walter Guion*, Attorney General, and *J. Ward Gurley*, District Attorney (*Louis Guion*, of counsel), for the State.

PROVOSTY, J. The defendant was convicted of manslaughter, and sentenced to twenty years in the penitentiary.

The first complaint is to the admission of the dying declaration of the child (a child ten years old) with whose killing the defendant is charged. It is urged that the testimony did not show that the child was under a sense of impending death. We think, with the learned judge *a quo*, that the testimony did show that fact.

The next ground of complaint is that proper ground was not

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\*See DYING DECLARATIONS in Table of Topics.

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laid by proof of the competency of the child; the contention being that a child of ten is presumed to be incompetent, and that the same rule applies to her dying declaration as would apply to her testimony if she were offered as a witness on the stand. The legal proposition thus advanced is unquestionable. Greenleaf, para. 157; *Reg. v. Perkins*, 9 Car. & P. 395; *Donnelly v. State*, 26 N. J. Law, 506. But the record shows that a large number of witnesses were examined on the trial, whose testimony has not been brought up. The presumption is that the competency of the child was sufficiently brought out by the testimony of these witnesses. Nothing shows that objection was made on that ground in the course of the trial. The presumption is, therefore, that there was no ground for objection.

The next complaint is to the refusal of the judge to assign to a later day the hearing on the motion for new trial. The judge makes the following explanation of his course in the matter:

"By the Court: This case was continued from May 9th to May 16th to enable the defendant to procure other counsel to apply for a new trial; her attorney, Mr. Moran, having decided that he had no ground upon which to base such an application. A few days prior to May 16th, Messrs. Foley and Nix requested that they be granted further time to make the application, and by agreement the filing and hearing of the motion was fixed for Friday, May 23d. Up to this time no request to transcribe all of the testimony had been made, and that relative to the dying declaration was the only part requested, and had already been written out and given to counsel. The case went over to Monday, May 26th, and all the testimony was given counsel; and, as the motion was not heard until quite late in the day, ample opportunity was afforded to examine it."

We think the complaint is fully answered.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed.

## PENNINGTON V. COMMONWEALTH.

24 Ky. Law Rep. 321—68 S. W. Rep. 451.

Decided May 23, 1902.

DYING DECLARATIONS:\* *Manslaughter—Instructions as to right to defend self.*

1. Not necessary that the dying declarant should say expressly that he was going to die. His expectation of immediate death may be shown by the circumstances. Where the physician said he could not recover, and he was so informed, and that he so believed, and said that he was killed, and died an hour later, it was sufficient to render the statement admissible.
2. The portion of his statement of the facts, that "he was not doing a thing," was a statement of a fact, and not merely a conclusion.
3. Instructions that the jury could not find defendant guilty unless it believed beyond a reasonable doubt, etc., that he killed deceased not in his necessary or reasonably apparent necessary self-defense; and that he should be acquitted, if at the time, he had reasonable grounds to believe that the deceased was about to kill him or do him great bodily harm, and that it was or seemed necessary in the exercise of a reasonable judgment to avert real, or to the defendant, apparent danger, are sufficiently clear and definite.
4. Where the defendant's claim and evidence was that the killing was done in self-defense, he was not entitled to an instruction as to his right to kill in defense of his dwelling house.

Appeal from the Leslie County Circuit Court.

Jonathan Pennington, being convicted of manslaughter, appeals. Affirmed.

*H. C. Eversole*, for the appellant.*Clifton J. Pratt*, for the Commonwealth.

PAYNTER, J. The appellant was indicted for the murder of Finley Cornett. A trial resulted in a verdict of manslaughter, and his punishment was fixed at two years in the penitentiary. The errors complained of are: (1) Admitting the dying declarations of the deceased; (2) in giving and refusing instructions.

It is contended that the Commonwealth failed to show that the deceased was *in extremis*; that the deceased had not lost hope of recovery. The witness who proved the dying declara-

\*See DYING DECLARATIONS in Table of Topics.

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tion testified that the attending physician had said that there was no hope for the recovery of the deceased; that the deceased was advised that he could not recover; that he believed that he could not recover; that he said he was killed. The witness further testified that within an hour or so after the declaration was made Cornett died. The proof, we think, is conclusive that the declarations were made under a sense of immediate death. It is not essential to prove, before statements can be admitted as dying declarations, that the declarant expressly said that he was going to die. That he had such an impression may be inferred from his evident danger, or the opinions of the medical or other attendants stated to him. 1 Greenl. Ev., § 158. This is in accord with the opinions of this court. In the case under consideration the declarant was advised that he could not get well, and the evidence shows that he believed that he could not recover. We are unable to see how a more satisfactory basis for the admission of the statements as dying declaration could have been established than was done in this case. In the declaration proven the declarant was detailing the facts attending the infliction of the fatal wound, and, in speaking of his own conduct, said "he was not doing a thing." It is insisted that that expression is a conclusion, and not a statement of the fact. As part of the *res gestæ*, it was proper to allow the declarant to state what he did. When he stated he was doing nothing, he was not stating a conclusion, but a fact.

It is contended that instructions Nos. 1 and 2 did not make it certain "that the jury must believe the defendant has been proven guilty as it appeared to him at the time, but as it appeared to the jury." We do not think that the instructions are subject to that criticism. Under instruction No. 1 the jury could not find the defendant guilty unless it believed from the evidence beyond a reasonable doubt that he unlawfully, wilfully, and feloniously shot and killed Cornett, not in his necessary or reasonably apparent necessary self-defense. Under the second instruction the court told the jury they should acquit the defendant if they believed from the evidence that at the time the defendant shot and killed Cornett he believed, or had reasonable grounds to believe, that the deceased was then and there about to kill or do him some great bodily harm, and that it was nec-



essary, or seemed to the defendant in the exercise of a reasonable judgment to be necessary, to shoot and kill deceased, in order to avert the danger, real or to the defendant apparent. The third instruction told the jury that they ought to find defendant not guilty unless they believed beyond a reasonable doubt that he had been proven guilty. For the defendant an instruction was offered, which reads as follows: "If the jury believe from the evidence that the deceased, Finley Cornett, Bud Hensley, Bud Lewis, and others assembled at the house of the defendant, Jonathan Pennington, armed, and shot into the house of Jonathan Pennington, or that any one of them—Finley Cornett, Bud Lewis, Bud Hensley, or any one of them—or some other person, and acting in concert with them, shot in the dwelling house of said Pennington for the purpose of killing said Pennington or any one else in said house at the time, when it was not necessary to do so to protect themselves from death or great bodily harm at the hands of said Pennington or others inside of said house, then the defendant, Jonathan Pennington, had a right to resist the danger from said Finley Cornett and others assembled with him, even to the taking of the life of Finley Cornett or any one associated with him in said shooting, and to pursue them until they were ejected from his premises, and until said danger and assault from deceased and his associates was averted, even to the taking of the life of Finley Cornett or others associated with him." In our opinion, there are no facts upon which to base this instruction. There was some conflict in the testimony as to whether the deceased and certain other parties were invited to attend a dance at the house of the appellant. Elhanan Pennington and one Bledsoe were invited guests, friends of the appellant. Just before dark there was some difficulty between these persons—who, it is claimed, were not appellant's guests—and Elhanan Pennington and others. The trouble seemed to have been quieted down, and the dance progressed until about 11 o'clock at night. Most of the male guests were heavily armed. It is proven that Elhanan Pennington and Bledsoe fired their pistols into the floor on which they were dancing at times during the progress of the dance previous to 11 o'clock. About that hour the deceased went into the room to get his coat, for the purpose of leaving. As he was leaving

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the room, Elhanan Pennington made some offensive remark, and again fired his pistol into the floor. After the deceased had passed out of the room onto the porch, where there were other persons, some one—the testimony failed to show who—placed the muzzle of his pistol through the door, and shot Elhanan Pennington, inflicting a mortal wound. The Commonwealth's evidence conduced to show that the deceased and Juda Morgan started around the house to get away from it, when they met the appellant, who said that Elhanan Pennington was killed. Thereupon, without further comment, he shot the deceased. The defendant admitted that he met Juda Morgan and the deceased at the end of the house, but stated that the deceased had his pistol in his hand, and attempted to shoot him, whereupon he fired the fatal shot in self-defense. The killing by the appellant was not in defense of his castle, but according to defendant's testimony, was in his own defense. No one was apparently trying to injure the appellant, or any of his guests, except Elhanan Pennington, who was the disturbing element at the dance. The doctrine of *Wright v. Commonwealth*, 85 Ky. 123, 2 S. W. Rep. 904; *Estep v. Commonwealth*, 86 Ky. 39, 4 S. W. Rep. 820, 9 Am. St. Rep. 260, and *Saylor v. Commonwealth*, 97 Ky. 184, 30 S. W. Rep. 390, has no application to the facts of this case. The testimony tends to show that the appellant did not attempt to restrain Elhanan Pennington, who was his nephew, and Bledsoe, in their misconduct, and there is some testimony to show that he encouraged it.

The judgment is affirmed.

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### ANDERSON v. STATE.

117 Ga. 255—43 S. E. Rep. 835.

Decided March 12, 1903.

DYING DECLARATIONS:\* *Manslaughter—Instructions—Reasonable fear—Witness.*

1. In the trial of one accused of murder, evidence of declarations of the deceased as to the cause of his death and the person who killed him should be submitted to the jury, with proper instructions.

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\*See DYING DECLARATIONS in Table of Topics.

- tions, when the preliminary evidence shows *prima facie* that these declarations were made when the deceased was in *articulo mortis* and conscious of his condition.
2. There is no merit in an assignment of error to the effect that a certain charge, correct in itself, is erroneous because the court failed to charge some other propositions of law applicable to the case.
  3. In instructing the jury as to the law of self-defense in a case of homicide, there is no error, though the accused be a woman, in charging that, in order to justify the killing, it must appear that the circumstances were sufficient to excite the fears of a reasonable man—of one reasonably courageous and reasonably self-possessed—and not of a coward; the word "man" being used in its generic sense.
  4. In the absence of a request to charge, a new trial will not be granted because of the failure of the trial judge to instruct the jury fully as to the law applicable to the impeachment of witnesses.

(Syllabus by the Court.)

Error from the Ware County Superior Court; Hon. F. W. Dart, Judge.

Kizzie Anderson, convicted of voluntary manslaughter, brings error. Affirmed.

*Simon W. Hitch*, for the plaintiff in error.

*The Solicitor General* and *E. J. Stafford*, for the State.

SIMMONS, C. J. Under an indictment for murder, Kizzie Anderson was found guilty of voluntary manslaughter. She moved for a new trial. The judge overruled the motion, and the movant excepted.

1. Evidence of certain declarations made by the deceased while he was in *articulo mortis* was admitted over the objection of the accused. The objection was that it did not appear that the deceased realized at the time that he was in a dying condition. "Dying declarations, made by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him, are admissible in evidence in a prosecution for the homicide." Pen. Code, 1895, § 1000. The evidence introduced in the preliminary examination to determine the admissibility of the declarations in this case was sufficient to show, at least *prima facie*, that the deceased was, at the time they were made, conscious of his condi-

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tion. It was therefore not erroneous to allow them to go to the jury; the court instructing the jury in his charge that the declarations should be disregarded unless the jury determine that the deceased was in a dying condition, and conscious of his approaching death. See *Varnedoe v. State*, 75 Ga. 181, 58 Am. Rep. 465; *Walton v. State*, 79 Ga. 447, 5 S. E. Rep. 203. Complaint was also made in the motion for new trial that the court erred in charging on the subject of dying declarations, in that the charge left the jury free to consider such declarations as evidence for all purposes, when by law they should be considered only in investigating the cause of the death of the deceased, and who killed him. We think the charge is not subject to this criticism. After the court had quoted the Code section above set out, and had explained that the court's admission in evidence of the dying declaration was upon a *prima facie* showing, the charge continued as follows: "It is now for you to determine, first, whether the evidence sufficiently showed that he was conscious of his approaching death, and that his death was really approaching, to authorize the admission of said declaration; and, if not, you should disregard the dying declaration altogether; but, if you think such evidence was sufficient for the introduction of such declaration under the rules as I have given you, you should then consider such declaration as evidence in the case, together with the other evidence." When taken in connection with the language of the Code section which had just been quoted by the court, this charge could not have been understood by the jury as leaving them free to make any use of the dying declarations except such as was authorized by that section.

2. One of the grounds of the motion for new trial complained that the court erred in giving to the jury a certain charge therein set out as to the law of manslaughter, "the objection to the above charge being that the court should have charged further" that under certain circumstances the killing would have been justifiable. The charge set out as to manslaughter was not attacked as incorrect in itself, and the only error assigned on it was that the court failed to give certain instructions as to the law of justifiable homicide. That such an assignment of error is without merit has been repeatedly held by this court.

See *Roberts v. State*, 114 Ga. 450, 40 S. E. Rep. 297, and cases cited.

3. Another ground of the motion assigned error on the following charge of the court, given in connection with other instructions as to reasonable fears: "The fears must be those of a reasonable man—one reasonably courageous and reasonably self possessed—and not those of a coward." The error assigned was that this charge required a greater degree of courage and self-possession than is required of a woman under the law. This charge used the word "man" in its generic sense—the sense in which it is used in section 71 of the Penal Code of 1895. That section is as follows: "A bare fear of any of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man and that the party killing acted under the influence of those fears and not in a spirit of revenge." That the court used the term "man" in its broader sense more clearly appears when the court's charge is further examined, for a subsequent portion of it contains the following: "You must examine into the case, and say whether or not the circumstances surrounding the case at the time it is alleged the defendant shot the deceased were sufficient to excite the fears of a reasonable person. . . . See whether or not the circumstances were, at that time, sufficient to arouse the fears of a reasonable person." Courage and self-possession are mental attributes or qualities possessed in different degrees by different persons. The law, in cases of homicide, does not take into account the actual fears of the slayer, but considers all the circumstances with reference to a determination as to whether they were sufficient to excite the fears of a reasonable person. Among the circumstances to be considered are the sex, strength, size, and position of the slayer. The rule of law given in charge by the court is correct and applicable to a case where the accused is a woman, as well as where the accused is a man. If the accused had in this case desired special attention to be called to her sex, as a circumstance to be considered in determining whether the circumstances were sufficient to excite the fears of a reasonable person, a proper request should have been made.

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4. The remaining grounds of the motion complained of the failure of the court to charge with sufficient fullness the law applicable to the impeachment of witnesses. The court did instruct the jury as to the different methods by which witnesses might be impeached, and no complaint was made of the instruction given. If more specific instructions were desired, a proper request therefor should have been made. Indeed, in the absence of a proper request to charge, a new trial would not be granted, had the court failed wholly to instruct the jury as to the law applicable to the impeachment of witnesses. *Boynton v. State*, 115 Ga. 587, 41 S. E. Rep. 995.

Judgment affirmed.

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SMITH v. STATE.

110 Ga. 255—34 S. E. Rep. 204.

Decided Oct. 26, 1899.

DYING DECLARATIONS:\* *Instructions thereon.*

1. When the state undertakes to lay the foundation for proving dying declarations, it is the duty of the presiding judge to pass upon the testimony offered for this purpose, and to determine therefrom whether or not evidence of the alleged declarations is admissible. *Campbell v. State*, 11 Ga. 376; *Dumas v. State*, 62 Ga. 58; *Mitchell v. State*, 71 Ga. 128; *Von Pollnitz v. State*, 18 S. E. 301, 92 Ga. 16.
2. It is not, after so doing, and after allowing such evidence to be introduced, erroneous to instruct the jury that: "It is the duty of the court to determine from the preliminary examination whether or not the evidence is admissible, . . . but if the jury conclude that, though admitted to them by the judge, the person so making the statement was not in the article of death, or was not conscious of his condition at the time, or if the statement as claimed to be made was not the true statement made, then the jury would not be authorized to consider that as a dying declaration, though it was so claimed as tending to incriminate the defendant." The use of such language as that just quoted is not violative of the statute forbidding the judge from expressing or intimating an opinion concerning the evidence.
3. The evidence warranted the verdict, and the record discloses no cause for reversing the judgment denying a new trial.

(Syllabus by the Court.)

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\*See DYING DECLARATIONS in Table of Topics.



Error from the Houston County Superior Court; Hon. W. H. Felton, Judge. Conviction affirmed.

Judgment affirmed. All the justices concurring.

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MEDINA V. STATE.

43 Tex. Cr. Rep. 52—63 S. W. Rep. 331.

Decided May 8, 1901.

DYING DECLARATIONS: \* *Deficient bills of exception.*

1. Bills of exceptions should set out the entire dying declaration so that the Appellate Court can intelligently pass upon its admissibility.
2. That it was not error to admit statements of deceased in addition to detailing the circumstances of the shooting, that there were wire fences and brickyards there, for this tended to fix the venue and to identify the locality of the crime, and so was part of the *res gesta*.
3. Neither was that part of the declaration, that when deceased came upon defendant and others, and was shot by defendant, that they were killing or skinning a beef, inadmissible, as it tended to show cause or motive for the shooting.

Appeal from the El Paso County District Court; Hon. A. M. Walthall, Judge.

Marcas Medina, being convicted of murder in the second degree, appeals. Affirmed.

A. G. Wilcox, for the appellant.

Robt. A. John, Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at seventy-five years' confinement in the State penitentiary; hence this appeal.

The first two bills of exception propose to call in question the action of the court in admitting as a part of the dying declaration certain statements of the deceased in regard to the location of certain wire fences and brickyards as being near the scene of the homicide. An examination of these bills show

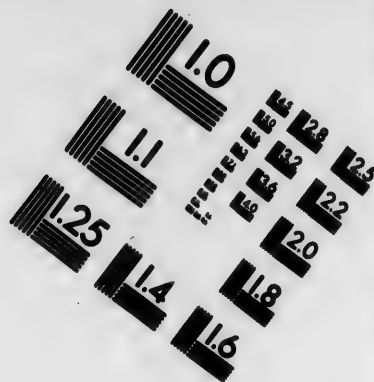
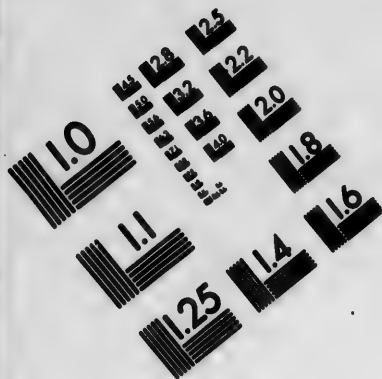
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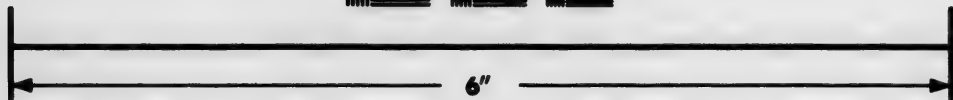
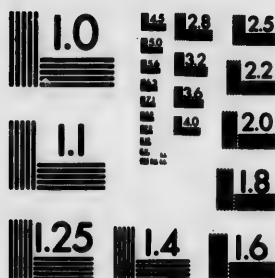
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they are not sufficient to raise the question as to whether or not said testimony was admissible as a part of deceased's dying declaration, for the reason that the bills do not set out the entire dying declaration so that the connection in which said testimony occurs might be seen. *Edens v. State* (Tex. Cr. App.), 55 S. W. Rep. 815. But, concede the bills are sufficient, was it proper to admit the evidence complained of as a part of the declaration? We understand the rule to be that dying declarations relate only to the *res gestæ* of the homicide; that is, the statements must be confined to what actually transpired at the place of the killing—i. e., who were the actors, where it occurred, the position of persons, what was said by the parties, the instrument used, and how the homicide was committed. A dying declaration is admissible to show all the facts immediately connected with the homicide to which a witness, were he present, could testify. This would exclude narratives of past transactions and opinions or mere conclusions of the declarant. See *Roberts v. State*, 5 Tex. App. 141; *Warren v. State*, 9 Tex. App. 619, 35 Am. Rep. 745; 1 Greenl. Ev., § 159; *Boyle v. State* (Ind.), 5 N. E. Rep. 203; *People v. Abbott* (Cal.), 4 Pac. Rep. 769. And see note to *State v. Johnson* (S. C.), 9 Cr. Law Mag. 461 (s. c., 1 S. E. Rep. 510). Now, it appears, if we look to the statement of facts, the declarant stated substantially: That he rode to where appellant and three other persons were skinning a beef. That appellant immediately assaulted him with a gun, and deceased said to him, "Don't kill me, and I will say nothing about this;" and appellant said, "No, Cabron; you are always finding us doing this kind of thing, and I will kill you here." Appellant then fired on him. His horse ran a short distance, when he fell off, and crawled in some bushes. That about that time a third one of the party came out, and fired in the bushes where he lay. That the parties then got on their horses, lifted some meat on their wagon, and pulled out. They left him there, and he crawled through the bosque and got lost, and when daylight came he was in the same place that he started from. That there were some wire fences and brickyards there. Now, the objection is to that portion of the testimony relating to the wire fences and brickyards. This was stated by the declarant as the place where he was shot, and was



# IMAGE EVALUATION TEST TARGET (MT-3)



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used, in connection with other testimony, to identify the place as being in El Paso County—that is, evidence of venue. This related directly to the *res gestæ* of the homicide as identifying the place by its surroundings. It would have been perfectly competent for the witness, had he been before the jury, to have stated these facts. Furthermore, even conceding that the evidence admitted was not part of the *res gestæ*, still we fail to see how it could possibly work any injury to appellant. It was only used, as we take it, in connection with other testimony, to identify the place where the homicide occurred, and thus to aid in establishing the venue of the offense in El Paso County; and the venue was abundantly established by other testimony, and was not a controverted issue in the case.

The third bill of exceptions also refers to a part of deceased's dying declaration, but is equally as defective as are the first two bills, in that it fails to set out the full declaration. The ground of objection urged to the testimony is not a certificate by the judge that the facts were true. The bill shows that the district attorney asked the witness Bryant (who was proving up the dying declaration) the following question: "Did Jose Alvarez [deceased] say anything about what defendant was doing at the time he shot him?" to which witness answered, "He said they were skinning or killing a beef." This was objected to by appellant on the ground that it related to another and different fact, and was no part of the act of shooting of said Alvarez by defendant. In our opinion, it was intimately involved in the act of shooting. It was a part of the *res gestæ* of the homicide, and showed the immediate cause therefor; that is, it showed that just before the shooting deceased came upon appellant and others, who were skinning a beef, which they had evidently stolen from him or some one else; and on this account appellant shot him. This was a part of the *res gestæ* of the transaction, and, if deceased had been present, he could have testified thereto. We have carefully examined the record, and, in our opinion, the evidence amply supports the verdict, and the judgment is affirmed.

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## GRUBB v. STATE.

43 Tex. Cr. Rep. 72—63 S. W. Rep. 314.

Decided May 22, 1901.

DYING DECLARATIONS: \* *Manslaughter—Plat—Res gesta—Self-defense—Instructions.*

1. Instructions on self-defense held to be in accordance with the evidence and the issue before the jury. (Facts summed up in the opinion.)
2. A dying declaration is not vitiated by the answer of deceased to a question by the county attorney that "Sam Grubb (defendant) came ten or twelve feet nearer where I was at the time he shot than he was at the time I first saw him," being a statement of a part of the difficulty itself, and explanatory thereof. So also, the statement "I had no weapons with me of any kind except my pocket-knife, which was in my pocket," was part of the *res gesta*, and explanatory of the affair, especially as affecting the issue of self-defense.
3. A plat of the immediate vicinity where the difficulty occurred, made by deceased to explain his dying statement, was properly admitted as a part of his statement.

From the Hamilton County District Court; Hon. W. J. Oxford, Judge.

Sam. Grubb, being convicted of manslaughter, appeals. Affirmed.

*J. C. Main and Eidson & Eidson*, for the appellant.

*H. N. Graves and Robt. A. Johns*, Assistant Attorney General, for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter, and his punishment assessed at two years' confinement in the penitentiary.

He requested several instructions presenting self-defense, and reserved an exception to the court's charge on this issue. In regard to this the record discloses that deceased was a brother-in-law of defendant, having married his sister some six years prior to the homicide; that prior to the difficulty deceased and his wife had separated, and at the time of the homicide she was living in her father's residence; that enmities and bitter feel-

\*See DYING DECLARATIONS in Table of Topics.

ings were engendered by reason of these matters between the parties, and deceased had made threats against the entire Grubb family, especially his father-in-law. On the night of the homicide, appellant and an unmarried sister and deceased attended the same church, and some half hour after the services deceased was in the yard, crawling towards the residence of his father-in-law. His dying declaration shows that, as he was passing along the street near the residence, he saw a light in the room occupied by his wife and children, and he immediately got over the fence, and was crawling in the direction of her room. As he was approaching the house, he saw his father-in-law and appellant (who also resided there) standing near the chimney on that side of the house which he was approaching. Appellant hailed him. He turned to run, and was fatally shot in the back by appellant. Appellant testified that his father was not with him at the time of the shooting; that he saw deceased crawling in the yard, and hailed him; that deceased made a move as if to pull his pistol, and he (appellant) fired. From several witnesses threats were shown to have been made by deceased against his father-in-law, as well as the entire Grubb family. The court charged the jury with reference to the defense by appellant of himself from apparent danger, as well as from the standpoint of threats; and, further, that he had the right to defend against the attack or supposed attack by deceased on any member of the Grubb family. As we understand the testimony, these were the issues, and the court's charge presented them favorably to appellant. There was no testimony showing an intent on the part of deceased to do any act other than to carry out or put into execution the threat to take the life of some member of the Grubb family. If he was a mere trespasser, as above stated, and simply for this reason appellant shot, then his offense would not be of less grade under the circumstances of this case, than manslaughter. Of this offense he was convicted, and given the minimum punishment.

Objection was urged to the admission of the dying declaration: First, for want of a sufficient predicate; second, the declaration was in response to questions asked by the county attorney, and was, therefore, not voluntary. Some of the objections set out in the bill the court certifies were not urged when

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the declaration was admitted. It is, therefore, not necessary to consider them. The county attorney asked deceased, while making his dying declaration, this question: Whether or not Grubb approached him from the time he (Anderson) first saw Grubb until the first shot was fired. The answer was, "Sam Grubb came ten or twelve feet nearer where I was at the time he shot then he was at the time I first saw him." The court certifies this matter was not objected to at the time it was offered. However, we believe the testimony was admissible, even had exception been properly reserved. It was a part of the difficulty itself; it was in explanation of the matters immediately environing the killing, and therefore admissible. So with reference to that portion of the declaration, in which the declarant stated, "I had no weapons with me of any kind except my pocketknife, which was in my pocket." It was contended by appellant that deceased made a demonstration as if to draw a pistol or some weapon, which left the impression upon his mind that his life was in danger. This was an act by deceased, or it was in relation to an act or supposed act by deceased, at the time entering into the difficulty, and was the deceased's statement of this portion of the difficulty which led to the killing. It was *res gestæ*, a part and parcel of the matter, and explanatory of the immediate facts.

The introduction of the plat of the immediate scene of the killing was proper as a part of the dying declaration. It showed the immediate surroundings and premises where the killing occurred. If a correct plat, it was admissible whether a part of the dying declaration or not, and it would make no difference who made the plat. The mere fact that deceased made it, and connected it with and in explanation of his dying statement, would not be ground for excluding it. We believe the testimony supports the conviction. The judgment is affirmed.



## STATE v. McKNIGHT.

119 Iowa, 79—93 N. W. Rep. 63

Decided Jan. 21, 1903.

DYING DECLARATIONS: \* *Murder in second degree—Harmless error as to evidence and instructions—Conceded facts.*

1. Taken in connection with the evidence of the attending physician and others, that deceased was fatally injured, her expressions that "I can never get well. You don't know how bad I am hurt." "I will never get over it;" the substance of various expressions being that she "expected to die," etc., sufficiently indicated that her dying declarations were made under the apprehension of impending death.
2. While evidence of other assaults would not be permissible, still where evidence was allowed that the declarant said defendant had assaulted her previously, and such evidence was withdrawn or stricken out on motion of the prosecution, and the defendant did not ask an instruction that the jury should disregard such withdrawn evidence, the error was not so vitally prejudicial as to call for a reversal.
3. Statements of witnesses that deceased "appeared to be despondent," "did not seem hopeful," etc., etc., may be classed as questions of mixed fact and conclusion, which may be testified to by the ordinary observer.
4. An instruction that it was conceded that deceased died of blood poisoning will not be regarded as prejudicial error in invading the province of the jury, when both the prosecution and the defendant introduced evidence to show that such was the fact, however attributing the blood poisoning to different causes.
5. Sentence of 25 years not excessive.

Appeal from the Woodbury County District Court; Hon. A. R. Dewey, Judge.

Defendant, being convicted of murder in the second degree, appeals. Affirmed.

*Sullivan & Griffin*, for the appellant.

*Charles W. Mullan*, Attorney General, and *Charles A. Van Vleck*, Assistant Attorney General, for the State.

WEAVER, J. 1. The deceased was wife of the defendant. She was injured, it is alleged, in an assault made upon her person by the defendant about Friday, June 14, 1901, and died on

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Sunday, June 23, 1901. On Monday, June 17th, and again on Friday, June 21st, she made statements concerning the alleged assault upon her by defendant, which statements were admitted in evidence as dying declarations. It is earnestly contended by counsel that the admission of this testimony was erroneous, for the reason that there was no sufficient showing that the declarations were made by the woman under a sense of impending death. With the general rule of law as stated by counsel for appellant, and the authorities cited, we are not disposed to take issue. We think, however, upon a careful reading of the testimony, that, even under the rule advanced in argument, the evidence was properly admitted. Without stopping to quote extensively from the record, it may be said that it is shown by several different witnesses that very soon after receiving her injury the woman became rapidly and alarmingly ill, and that as early as Monday thereafter she began to indicate her belief that her condition was hopeless, saying: "I can never get well. You don't know how bad I am hurt." "I will never get over it." Other witnesses, attempting to express the substance of her statements, say she "expected to die," and use other like expressions. These statements, taken in connection with the testimony of the physician and others showing that she was in fact very sick, and apparently fatally stricken, sufficiently indicate her consciousness that her death was at hand, and that she spoke under the solemn apprehension of impending dissolution. We have had recent occasion to consider the law concerning dying declarations (*State v. Phillips*, 118 Iowa, 660, 92 N. W. Rep. 876), and think it unnecessary to enter upon any general discussion of that subject at this time.

2. One or more of the witnesses to the dying declarations were permitted to testify that the deceased, after stating the particulars of the alleged assault, further said, in substance, that he had assaulted her on a former occasion, and she was not yet well from the hurt then inflicted upon her by defendant. It is argued that the law which permits the use of dying declarations in evidence limits them strictly to the facts and circumstances attending the immediate injury from which the declarant is about to die, and that statements as to prior occurrences are inadmissible. This, we think, is a correct statement

of the law. *State v. Perigo*, 80 Iowa, 37, 45 N. W. Rep. 399; *State v. Oshea*, 60 Kan. 772, 57 Pac. Rep. 970; *Perry v. State*, 102 Ga. 365, 30 S. E. Rep. 903; *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815. It appears, however, from the record, that before the close of the trial this evidence was withdrawn or stricken out upon the motion of the county attorney, and the error of its admission was thereby cured. Appellant makes the point in argument, that in view of the prejudicial character of the testimony, the court should have called the jury's attention to its withdrawal, and especially directed them to disregard it. Such direction is, without doubt, the better practice, and the trial court would doubtless have given it upon defendant's request. No such request was made, and the matter has no such vital relation to the essential elements of the crime charged that failure to instruct upon it without being asked so to do will justify a reversal.

3. Error is assigned upon the admission of testimony of non-expert witnesses as to the appearance and condition of the deceased during the time between the alleged assault and her death, the particular point being made that these witnesses were not required to first state the facts upon which their statements or conclusions were based. The statements to which these criticisms are directed were to the effect that the deceased "appeared to be despondent," "did not seem hopeful," "had a fever," and other expressions of the same general nature. That the rule contended for is applicable in cases where nonexpert witnesses assume to express an opinion of the mental soundness or unsoundness of a person will be admitted, but the testimony here objected to does not come within that class, but, rather, within the well-recognized class of matters of mixed fact and conclusion, which may properly be testified to by the ordinary observer. *Reininghaus v. Association* (Iowa), 89 N. W. Rep. 1113; *Will v. Village of Mendon*, 108 Mich. 251, 66 N. W. Rep. 58; *Insurance Co. v. Sheppard*, 85 Ga. 751, 12 S. E. Rep. 18; *Railway Co. v. Reagan*, 34 S. W. Rep. 796; *People v. Lavelle*, 71 Cal. 351, 12 Pac. Rep. 226; *Baker v. Comins*, 110 Mass. 477.

4. In the twentieth paragraph of its charge the court said to the jury, "It is a conceded fact in this case that the deceased, Nicholine McKnight, came to her death from septicemia, com-

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monly known as 'blood poisoning,' the source of the malady being in contention." This is said to be an invasion of the province of the jury, as the defendant had entered a plea of not guilty, and the burden of proving guilt was upon the State. That the burden of proving every essential element of the crime charged rests upon the State throughout the trial is an elementary principle of the criminal law, but it does not follow that a particular evidential fact which is expressly admitted or is assumed or treated as true by both parties upon the trial may not be so treated by the court in its instructions. The record shows that both the State and the defendant contended that the immediate cause of the death of Mrs. McKnight was blood poisoning; the State claiming and offering evidence to show that the poisoning proceeded from or was caused by the wounds and injuries inflicted upon her by the defendant, while he contended and offered evidence tending to show that it proceeded from or was caused by a sore or ulcer of long standing, with which it was claimed the unfortunate woman was afflicted. In *State v. Archer*, 73 Iowa, 320, 35 N. W. Rep. 241, we held it was not error for the court, upon a trial for murder, to state to the jury that the killing was admitted, when such appeared to be the fact. The charge in the case before us seems to be fairly within the rule of this precedent. See, also, to the same effect, *Wiborg v. United States*, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; *People v. Phillips*, 70 Cal. 61, 11 Pac. Rep. 493; *Hanrahan v. People*, 91 Ill. 142; *State v. Day*, 79 Me. 120, 8 Atl. Rep. 544; *State v. Angel*, 29 N. C. 27; *State v. Williams*, 47 N. C. 194; *Edwards v. Territory*, 1 Wash. T. 195; *State v. Zinn*, 61 Mo. App. 476. Other instructions given by the court are criticised, but we think they are in accordance with the law as approved by this court on numerous occasions. The charge of the court, as a whole, appears to be fair and impartial, and contains no reversible error.

5. The judgment, imposing upon the defendant a sentence of imprisonment for a term of twenty-five years, is said to be excessive. We cannot interfere with it. The crime, as the evidence tends to establish it, was of a peculiarly brutal and heartless character, and the appellant cannot justly complain of any penalty less than the extreme limit provided by the statute.

The judgment of the district court is affirmed.

## PEOPLE v. LONSDALE.

122 Mich. 388—81 N. W. Rep. 277.

Decided Dec. 21, 1899.

DYING DECLARATIONS: \* *Manslaughter by abortion—Evidence.*

1. Bloodpoisoning; condition very low; temperature and pulse extremely high; physician told her she was very sick, and while he would do what he could, he could not promise her anything in the way of recovery; she looked like a dying person, and appeared to realize that such was her condition, and died nine hours later, her dying declarations were admissible.
2. It was error to admit evidence tending to show a willingness or at tempt of defendant to commit another offense of similar nature.
3. Comment on improper remarks in presence of the jury.

Error to the Recorder's Court of Detroit; Hon. William W. Chapin, Judge.

Alice G. Lonsdale, being convicted of manslaughter, brings error. Reversed.

Orville B. Cragg (*Phillip T. Van Zile*, of counsel), for the appellant.

Horace M. Oren, Attorney General, and Allan H. Frazer, Prosecuting Attorney, for the People.

GRANT, C. J. Respondent was convicted of the crime of manslaughter by abortion. The theory of the prosecution was that on February 21, 1899, the respondent used an instrument for the purpose of procuring the abortion; that the womb was perforated; that deceased aborted on the morning of the 21st; and that she died at 5 o'clock on the 23d. That an abortion had been committed was conclusively established.

1. The first error alleged is the admission of the dying statement of the deceased that the respondent committed the act. The objection is that it does not appear that the dying declaration was made under a sense of impending death. The decisions upon this subject are many. See *People v. Knapp*, 26 Mich. 115; *People v. Olmstead*, 30 Mich. 431; *People v. Beverley*, 108 Mich. 509, 66 N. W. Rep. 379; *People v. Weaver*, 108 Mich. 649, 66 N. W. Rep. 567; *People v. Simpson*, 48

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Mich. 477, 12 N. W. Rep. 662. The mother of the deceased testified that the daughter was ill on the morning of the 22d; that later in the day she had pains and cramps; that she vomited, was feverish, and looked very ill. Dr. Day was sent for in the evening, but was unable to come until about 6 o'clock on the morning of the 23d. The doctor testified on entering the room he formed his opinion very quickly from the odor, that the girl had blood poison, brought on by an abortion. Her pulse was between 130 and 140; her temperature 103 or 104; her condition very low. "Q. Did you communicate to her her condition? A. I told her that she was a very sick girl, and that I was surprised to find her in that condition; that under such circumstances I could promise her nothing in the way of recovery, but that I would simply promise to do all that medical skill was able to do under the circumstances; and that it would be impossible for me to properly treat her in her own house, and that she would have to be taken to the hospital for proper treatment. Q. Did she seem to realize that she was liable to die? A. Yes, sir. Q. How did she look? A. She looked like a person dying. Q. Then? A. Then; yes, sir. Q. Did she appear to realize it after you told her this? A. Yes, sir. Q. Did you ask her then any questions as to the cause of her sickness? A. I told her that, considering the grave condition in which I found her, that it was only fair and right that she should tell me how she happened to get into such a condition." The deceased then told the doctor that the respondent produced the abortion by means of an instrument. The girl was removed to the hospital about 8 o'clock that morning, and died at 5 in the afternoon. Greenleaf says: "It is enough, if it satisfactorily appears, in any mode, that they [dying declarations] were made under that sanction [impending death], whether it be proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other circumstances of the case." 1 Greenl. Ev., § 158. The admission of dying declarations forms an exception to the law of evidence, and is now confined to cases of homicide. Their admission is based "upon the ground of the public necessity of preserving the lives of the community by bringing manslayers to justice. For it often



happens that there is no third person present to be an eye-witness to the fact; and the usual witness in other cases of felony, namely, the party injured, is himself destroyed." 1 Greenl. Ev., § 156. When there is evidence to show that they are made in *extremis*, they are admissible, and the weight to be given to them in each case is the province of the jury. In *People v. Knapp*, this court, speaking through Justice Campbell, said: "Their value depends on their intrinsic probability, and the candor and truthfulness of the person making them, as well as upon the fullness and fairness with which they are taken and reported. Where they are taken under suspicious circumstances, or drawn out by doubtful means, they are not excluded, but go to the jury for what they are worth. The whole admission is from necessity—the witness having passed away—and the objections are therefore confined to the weight and value of the declarations." The language of the court, speaking through Justice Marston, in *People v. Simpson*, at pages 477, 478, 48 Mich., and page 663, 12 N. W. Rep., is applicable here. This language is quoted with approval in *People v. Weaver*, at page 651, 108 Mich., and page 567, 66 N. W. Rep. The reason for admitting these declarations is especially applicable to cases of abortion, where usually only two parties have knowledge of the crime—the abortionist and the person upon whom the abortion is produced. While this is no reason for relaxing the rule that they must be made in view of impending death, yet it is a reason why Appellate Courts should be slow to reverse the holding of the trial judge, who saw the witnesses, and can better judge of their truthfulness and of the surrounding circumstances. We think there was sufficient evidence, within the former rulings of this court, to justify the admission of the declaration.

2. The prosecution introduced the testimony of a witness to show that she had applied to the respondent to have an abortion produced upon her. The testimony was very weak, and was evidently that of an unwilling witness. However, there was sufficient in it to show the purpose of the woman's visit, and that some acts were done towards the accomplishment of that purpose. The attorneys for the People justify this testimony on the ground that it tended to prove guilty knowledge

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or intent, and rely upon *People v. Seaman*, 107 Mich. 348, 65 N. W. Rep. 203. This case is not within the rule there announced, or within the authorities there cited. This case does not form an exception to the general rule of evidence. Where the intent or guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible, and violates the rule that the evidence must be confined to the issue. Upon the record, there is no room for an inference that death resulted from accident, or that the operation was performed to save the life or health of the deceased. On the contrary, if the jury found that the dying declaration of the deceased was true, the crime was complete, and the jury could not find otherwise than that it was done with guilty knowledge and intent. This testimony should have been excluded, and for this reason the conviction must be set aside.

3. Error is assigned upon a remark of the prosecuting attorney during the taking of testimony. The remark was highly improper, but no more so than the remark made by the attorney for the respondent which provoked it. Whether the remark was sufficiently prejudicial to justify a reversal, we need not determine, as the case is reversed upon another ground. We are constrained to say again that such conduct in the trial of causes, especially criminal ones, is discreditable to attorneys; and the courts should, without waiting for objections, promptly suppress the language and reprimand the attorneys. Reversed, and new trial ordered.

LONG, J. I concur in reversing the judgment on the ground stated by my Brother Grant, but I am of the opinion that the testimony given on the trial did not establish the fact that the so-called dying declaration was made under such circumstances that it became competent evidence. It seems to me that there is no testimony showing that the declaration was made under the fear of death.

## STATE V. JESWELL.

22 R. I. 136—46 Atl. Rep. 405.

Decided May 28, 1900.

DYING DECLARATIONS: \* *Prima facie* statements—Caution—Controverting them—Murder—Evidence.

1. Dying declarations not unconstitutional evidence.
2. Because of their necessary infirmities, *ex parte* nature, and absence of the accused, the law does not regard them with favor and they should be received with great caution.
3. A dying declaration taken by the coroner under the statute, which recited that the declarant was "in the fear and expectation of death," is *prima facie* evidence of such condition. However, it is desirable that the trial court should inquire into the condition, appearance, sayings of the declarant and what was said to him on that subject, and whether his statement was read over to him before signing it.
4. The defendant can inquire into the truth of such statements and can introduce evidence to controvert them; but in the absence of any effort on his part to do so, such statement as to declarant's condition will be accepted as evidence that he was under the apprehension of approaching death.
5. Evidence held sufficient to justify the verdict.

Defendant, Pedro Jeswell, being convicted of murder, petitions for a new trial. Petition denied.

*Willard B. Tanner*, Attorney General, for the State.

*Augustus S. Miller* and *Harry C. Curtis*, for the defendant.

TILLINGHAST, J. The defendant, who on the 10th day of January, 1899, was convicted of the crime of murder, now petitions for a new trial on the grounds that the verdict was against the evidence, and that the justice presiding at the trial erred in permitting the State to offer in evidence a paper purporting to be the dying declaration of George G. F. Collins, the person whom the defendant is charged with having murdered.

We will first consider the question raised regarding the admissibility of the paper referred to. Harmon S. Babcock was called as a witness by the State, and testified that he was a coroner in East Providence, and that he saw the deceased after he was wounded, and took his *ante mortem* statement. This,

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statement was thereupon produced by the witness, and, after being read by the justice presiding, was allowed to be offered in evidence, against the defendant's objection. The paper was as follows: "I, George G. F. Collins, of Seekonk, Mass., being in the fear and expectation of death, do make the following statement as my dying declaration: I was hurt in Rumford, R. I., on Newman avenue, at about half past 12 a. m. on October 2, 1898. I got into an argument with another party on the car—electric car. He got off on one end, and I got off at the other. He came around and stabbed me. I could not state what the weapon was. I had not struck him, or done anything of the kind. I don't know his name. He had a soft, black hat on, and he had a brownish suit, with a short coat. He was a man about my height,—five feet, eleven inches; a man of fair, fresh, lightish complexion. He had black eyes, I think. I should say he was either French or Italian. He came up in front of me when he stabbed me. He got on the car again, I think, after he had stabbed me. Quite a number of Rumford people on the car—Victor Carlson, Alfred Johnson, Samuel Lindruth. [Signed] George G. F. Collins, his mark. Subscribed and sworn to this 3rd day of October, A. D. 1898, Rhode Island Hospital, city and county of Providence. Before me, Harmon S. Babcock, Notary Public." Defendant's counsel took the point that the paper was not admissible because there was no evidence to show that Collins believed himself to be beyond the hope of recovery and in a dying condition at the time, and they therefore insisted, and now insist, that the ruling was erroneous. Gen. Laws, ch. 287, § 15, provides that: "Whenever the coroner has notice that there is in his town any person who has been injured by the criminal act, omission or carelessness, of another, and that said person believes that his death is impending from such injury, said coroner may take the statement of such person concerning the manner in which, and the person by whom, such injury was inflicted; and the statement so taken shall be reduced to writing and, if practicable, in the presence of the injured person." It is clear that the principal object of this statute is to obtain and preserve the dying statement of a person whose injuries have been caused by the criminal act of another, to be

used as evidence in the prosecution of the person accused of the crime. But, independently of the statute, a dying declaration, in which the circumstances of the injury received are the subject thereof, taken by a magistrate, is always admissible in evidence against the accused, if it is clearly made to appear that the declarant fully believed that his death was imminent at the time of making the declaration. Oral and unsworn declarations of the injured person are also admissible in evidence, if it appear that they were made in view of impending death, on the ground that when one is in the "expectation of immediate death all temptation to falsehood, either from interest, hope, or fear, will be removed, and the awful nature of his situation will be presumed to impress him as strongly with the necessity of a strict adherence to truth as the most solemn obligation in a court of justice." Whart. Cr. Ev. (8th ed.), § 276; 1 Greenl. Ev. (13th ed.), §§ 156, 157, and cases in note; *State v. Dickinson*, 41 Wis. 306. See, also, *Maine v. People*, 9 Hun, 113; *Starkey v. People*, 17 Ill. 17; *Kilpatrick v. Commonwealth*, 31 Pa. St. 198; *State v. Swift*, 57 Conn. 496, 18 Atl. Rep. 664; *Commonwealth v. Cowper*, 5 Allen, 495; *Commonwealth v. Casey*, 11 Cush. 421. Such declarations are admissible as evidence against the accused, not because they constitute an exception to the constitutional right of the defendant to be confronted with the witnesses against him, but because they were admissible at common law, "and there is nothing in the constitutional declaration to shut them out." *State v. Waldron*, 16 R. I. 194, 14 Atl. Rep. 849, and cases cited; *State v. Dickinson*, 41 Wis. 308. As the test of the admissibility of such evidence was quite fully considered by us in the recent case of *State v. Sullivan*, 20 R. I. 114, 37 Atl. Rep. 673, there is no occasion for further discussion upon this point.

We come, therefore, to the point which is made by defendant, that there was no evidence to show that the deceased believed himself to be beyond the hope of recovery when he made the declaration. We think it is clear that the statement itself contains sufficient evidence to this effect. It starts out with the assertion that "I, George G. F. Collins, of Seekonk, Mass., being in the fear and expectation of death, do make the following statement as my dying declaration." This is certainly clear and explicit, and seems to contain all of the requisites of such

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a dying declaration as the law makes evidence in cases of felonious homicide. It is a component part of the entire statement, and, nothing appearing to contradict it, is entitled to as much credence as any other part thereof. It shows, *prima facie*, at any rate, that the deceased was *in extremis* when he made it, and that he fully appreciated his condition. And while we should have been better satisfied if the trial court had required the coroner to testify as to the condition of the deceased, how he appeared, what he said, and what was said to him by the coroner, regarding the statement and regarding his condition, and also as to whether the statement was read to the deceased before signing it, yet we cannot say, as matter of law, that the declaration was not admissible without these preliminaries; nor do we see that the defendant could have been prejudiced by omitting them, in view of the positive and unequivocal statements contained therein. It is pertinent to remark in this connection, however, that owing to the necessary infirmities of dying declarations, and particularly to the fact that they are made in the absence of the accused, and hence without any opportunity to cross-examine or contradict the makers thereof, the law does not look with favor thereon, and they should be received with great caution, and every reasonable opportunity should be given the defendant to ascertain the facts connected with the transaction. 3 Rice, Ev., § 336; *Mattox v. United States*, 146 U. S. 151, 13 Sup. Ct. 50; *People v. Hodgdon*, 55 Cal. 72. As the defendant in the case at bar had full opportunity, so far as appears, to cross-examine the coroner as to the condition and belief of the deceased in the premises, in addition to what was contained in the paper, but did not do so, it is fair to infer that he did not anticipate that anything more favorable to his defense than was contained in the paper itself would be obtained thereby. That evidence relating to the condition and state of mind of the deceased could have been offered by the defendant subsequently to the admission of the paper referred to is shown by the authorities (*State v. Swift*, 57 Conn. 496, 18 Atl. Rep. 664; *Kelly v. United States* [C. C.], 27 Fed. Rep. 616); the order in which the evidence is introduced being largely in the discretion of the trial court (*Town of Hopkinton v. Waite*, 6 R. I. 374).

The other ground upon which a new trial is based, namely,

that the verdict is against the evidence, cannot prevail. It appears that the defendant and Collins had an altercation while riding on the street car, just previous to the tragedy, and that there was some talk of a fight. But this trouble had apparently subsided before they left the car. It further appears, or, rather, there is evidence from which the jury might have found, that after the deceased got off the car the defendant ran after him and stabbed him. In any event, there is evidence from which the jury might have found that, even if the deceased invited the defendant to get off the car and fight him, of which there is some evidence, the use by the defendant of a deadly weapon during the fight (the deceased being unarmed) was sufficient evidence of malice to constitute the crime of murder. The testimony of the defendant that he voluntarily left the car after the deceased and those who were with him had alighted, because he was afraid that if he remained in the car they would shoot him, is wholly unreasonable; and the undisputed fact that he got off the car before reaching the point where he had intended to alight, leaving a bundle with one of his companions in the car, with a request to carry it home for him, strongly indicates that he intended to have a fight with the deceased. Further discussion of the testimony, which is quite voluminous, would serve no useful purpose. We have carefully examined it, together with the charge of the court, which was certainly as favorable to the defendant as he could reasonably have asked; and, on the whole, we do not feel warranted in disturbing the verdict. Petition denied, and case remitted for sentence.

NOTES ON DYING DECLARATIONS (by H. C. G.).—*Condensed general view of, and observations on the principles applicable to dying declarations.* To warrant the admission in evidence of dying declarations the following are indispensable requisites:

1. The declarant must have been *in extremis*, that is, in the last extremity—in extreme danger of impending death—and he must have been conscious of his condition, and his declarations must have been made under a sense of impending death.

2. A loose, vague or general expectation of death is not sufficient. A belief that he is in great danger, or that he will ultimately die, or will probably die, will not answer; but at the time of making his declarations, he must have a clear and settled conviction that he *will* certainly die in the almost immediate future. To have been in extreme danger of death, and yet not under a *clear sense of impending death* is not sufficient.

3. Neither to say that to hope that his belief without having yet at the recovery.

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3. Neither is it sufficient to be in fear or expectation of death, or to say that he expects to die, and yet not be without hope of recovery—to hope that something may transpire or be done to avert death—but his belief at the time of making the declarations must be, that he is without hope of recovery. If he had previously fully expected to die, yet at the time of making the declarations he had some slight hope of recovery, they are inadmissible.

4. Dying declarations should be received with great caution. They and all the circumstances surrounding them should be closely scanned, so as to determine whether the declarants understood what they were saying; whether their declarations truly represent what they understood, and what they intended to say; as to what influences surrounded them, especially as to what suggestions were made to them, and whether their statements were made in conformity to pressing questions and urgent solicitations.

These conditions may be shown by the dying declaration itself, or gathered from proper evidence relating to the declarant's condition, sayings, appearance, actions, demeanor and surroundings.

It is because of the taint of imperfection that pervades the universe, that attaches itself to man, and envelopes, distracts, and overwhelms him individually and collectively, physically and mentally, socially, economically and governmentally in all of his pursuits, actions and lines of conduct, that these safeguarding provisions are necessary. But they are also only imperfect and partial safeguards. It is also because of this inherent imperfection—playing off one defect against another defect, as it were—that these unilateral and dangerous declarations are at all admissible, on the theory that without them, there might be a lack of necessary proof.

Consider the dangerous features: Those familiar with the vagaries of the human brain as exemplified in the discordant and illimitable digressions of human testimony, have observed how witnesses whose interests and passions have been stirred, or whose impressions have been formed and fixed upon insufficient or erroneous information, will testify in accordance therewith most positively, and can only be convinced by patent demonstration of their erroneous positions.

The flooding of the brain with a magnetic current of passion or prejudice, or its submergence in a wave of selfish interest, will tinge and color the thoughts and sensations of that brain; will cause it to slip cogs in the wheels of logic, and will pervert and disarrange its mental operations; will suppress and obscure facts beneath the glare of the flashing spectres of overheated imagination. Preconceived and frequently rehearsed erroneous beliefs, in all but the most exalted philosophers, interfere with the exercise of the reason, and vitiate its conclusions.

The purpose of cross-examination is to minimize these imperfections, lapses and perversities, by testing the intelligence, means of knowledge, bias and honesty of the witness. But with the dying declarant there is no cross-examination, consequently no appropriate means of testing him in these respects. To offset this incurable defect, was brought forth the presumption that the sense of impending death would cause the declarant to speak only the truth, and thus



to quite an extent, become a substitute for cross-examination. We can infer that there was an element of philosophy under this presumption, viz., that inasmuch as passion, interest, malice, etc., are such controlling factors in life, now that life is about to terminate, that they will subside and cease to be incentives to mental action. However, this presumption was largely a theoretic conclusion. It could not take the place of cross-examination in testing the intelligence, means of knowledge and habits of the declarant. The ancient presumption that persons about to die, would infallibly speak the truth, was tinged with quite a strain of ancient delusion. While the solemnity of impending death would tend in most minds to induce truthfulness, still there is no certainty about it. As a matter of fact, passion and malice may, and sometimes do, dominate the mind to its last effort; and when passion subsides, hysteria and hypnotic influences are liable to take its place with their deceptiv enchantments. Besides, it may be well not to forget, that mankind are gradually undergoing transformations in their ideas, beliefs and delusions; that the increasing rays from science and learning are modifying them, and their influence upon the problems of life, and dissipating the apparitions of antiquity.

*Declarations insufficient to show abandonment of hope.* In the recent case of *State v. Phillips* (Dec. 20, 1902), 118 Iowa, 660, 92 N. W. Rep. 876, while the court said that it was not essential that the declarant should have disclosed his abandonment of hope in express words, which is however the more satisfactory way, and that his apprehension of death may be inferred from his condition and other circumstances, such as being informed by his physician and friends that he cannot live, by his sending for a priest, etc., by making his will, etc., etc., it held the following statements introduced as dying declarations clearly insufficient:

He said that "the nigger shot him;" (referring to the defendant, a mulatto); "I can't stand it if the pain does not leave me soon;" "If the pain does not leave me, I can't stand it much longer;" (after further questioning, answers were:) "He suffered so bad he could not stand. He must die;" "All that he said in regard to the matter was that if the pain did not let up or stop soon he could not stand a much longer;" "Those are the particular words he used, etc."

The only circumstances to aid the inferences from these expressions were that the declarant had been desperately wounded and was in a state of collapse, and died some hours later. The court among other things said: "We are impressed with the conviction that this is clearly insufficient. It must not be overlooked that the admission of dying declarations in any case is a marked exception to the general rule which excludes hearsay testimony in all judicial examinations. The accused, though upon trial for his life, has no opportunity to confront or cross-examine the person whose unsworn words are used against him, and it is a recognized principle that such exceptionable evidence be admitted only where the preliminary showing that the declarant was in fact *in extremis*, and had himself given up all hope of recovery, is clear and unequivocal. The fact that the declarant

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realizes that he is in danger of death, or believes that he must die if relief be not soon administered, is not enough." (Citing 42 N. E. Rep. 92; 31 Moak. 739; 17 Ill. 17; 1 Sneed, 215; 2 Lewin's Cr. Cas. 148; 72 Miss. 507, 17 So. Rep. 232; 79 Ga. 87, 3 S. E. Rep. 403.)

In conclusion on this question, the court said that these expressions rather implied that declarant had not yet despaired of relief than that he had abandoned all hope.

*A case of clearly incompetent dying declarations.* In *Barnes v. Commonwealth*, 110 Ky. 348, 61 S. W. Rep. 733 (1901), the trial court admitted first the statement of deceased when found lying "as asleep with his eyes closed," that "That fellow done me up;" "as I told you he has shot me in the side,"—and that after being removed to a house he said that it was all uncalled for. And subsequently he told of overtaking defendant and the renewal of the "fuss." That defendant rode ahead of him a few feet and jumped off, and drew his pistol as he came back and said, 'If trouble is what you are looking for you can get it,' and threw it down, and he (declarant) said, "I never did believe he was going to shoot me." The court in commenting upon the lack of evidence of a sense of impending death referred to Rice on Crim. Ev., sec. 330, wherein that author alludes to the fact that the declarant has been removed beyond the reach of cross-examination, and that the opportunity of investigating the question of malice, enmity and positive identification has been lost forever, and that a just indignation has been aroused in the minds of the triors by the mere recital of a hideous crime; and that to impart competency to this evidence "It must clearly appear that the declarant was conscious of the imminency of death, believed himself to be beyond the probabilities of recovery, and this belief must be evident by some word or act of a conclusive and unmistakable character," and held that the foregoing statement did not at all come within that rule.

*Wanting a doctor not always evidence of hope of recovery.* Declarant said "I am going to die before morning. Send for a doctor. My bowels are out on the ground now. I am going to die before morning." Also that defendant "had cut him and cut him for nothing."

The supreme court expressed itself as follows on this phase of the case:

"In determining whether dying declarations were made under the conviction of impending death, so as to make them receivable in evidence as such, requests made by the deceased for a physician's aid may, in connection with his other expressions and the circumstances, be regarded as indicating a hope of cure. *Justice v. State*, 99 Ala. 180, 13 So. Rep. 658. But not necessarily so, since a physician may be desired merely to alleviate pain or other purpose than to prolong life. *McQueen v. State*, 103 Ala. 12, 15 So. Rep. 824.

Here it was proved that shortly after receiving the fatal knife thrust the deceased, while lying down, said several times he was dying, that his bowels had been cut out, that he would die before morning, and that he "wanted a doctor." Taken in connection with the proof that the deceased was in fact *in extremis* while speaking them, the expressions of belief as to his condition are not controlled by his

request for a doctor, and were ample as a predicate for admitting the declaration made at the same time by the deceased to effect that defendant had killed him for nothing, and other like declarations made on the same occasion. *McQueen's Case*, *supra*; *Sullivan v. State*, 102 Ala. 135, 15 So. Rep. 264, 48 Am. St. Rep. 22." *Milton v. State*, 134 Ala. 42, 32 So. Rep. 653 (1902).

*Abandonment of hope held evident.* Where the physician informed declarant that there was a "chance for him" through an operation, yet when he made his dying declaration he said there was no chance for him and he would die, and soon died, held sufficient.

"Certain alleged dying declarations of the deceased were admitted in evidence over the objection of the accused, 'on the ground that what [the deceased] was undertaking to relate was before Dr. Cooper conferred with him, and that Dr. Cooper notified him later that there was a chance for him, and that was an operation; . . . that he could not have known that he was *in extremis*, because he was afterwards notified by the physician that there was a chance.' It appears from the record that the alleged dying declarations were made by the deceased both before and after Dr. Cooper had informed him that there was a chance for him to recover if an operation were performed. The witnesses who testified to the declarations swore that the deceased, at the time of making them, said he was going to die, and that there was no chance for him; and the evidence shows that he did die within less than a day thereafter. The deceased appears to have been conscious of his condition, and to have realized that there was no chance for his recovery, when he made these declarations; and, despite the surgical operation, the after event justified his belief. We think, therefore, that these declarations of the deceased were properly admitted, as being *prima facie* dying declarations; the jury being instructed to consider them as evidence in the case only in the event that they believed that these declarations were made by the deceased in the apprehension and immediate prospect of death, and in the article of death." *Wheeler v. State* (1900), 112 Ga. 43, 37 S. E. 126.

*As to defendant's right to introduce declarations of the deceased contradictory of those received as his dying declarations.*

In *Battle v. The State*, 74 Ga. 101, (104), the court said that if the *ex parte* dying declarations of the deceased, without cross-examination, were to be received contrary to the general rule of evidence, in the interests of justice, why should not his other statements, at variance with them, be received for a like reason? "The former is admitted in favor of public justice, why should not the latter in favor of life and liberty?" That as to the objection that deceased's attention was not called to the time, place and circumstances of the contradictory statements, the answer is sufficient, that of necessity this could not be done, the declarant being dead; and it stands on a like necessity as the admission of the dying declarations. That inasmuch as the prosecuting officers put in the former on all occasions, it is but right that the accused should have whatever benefit he may derive from contradictory statements of the deceased.

In *People v. Lawrence*, 21 Cal. 368, the defendant offered to prove

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that deceased had testified at the preliminary examination to matters contradictory to his dying declarations, which was rejected by the trial court. This was error, the court holding that while the sense of impending death may compensate for the lack of an oath, it can never make up for the lack of cross-examination. That dying declarations "are received with the greatest caution." That the rule for laying foundation for impeaching a witness does not apply to cases of dying declarations. "There would be no justice therefore in any rule which would deprive the accused under such circumstances of the right to impeach the credit of the deceased by proof of his having made contradictory statements as to the homicide and its cause."

The United States Supreme Court held in *Carver v. United States*, 164 U. S. 694, that it was error to not allow defendant to prove that the deceased made statements contradictory to her dying declarations, tending to show that defendant did not shoot her intentionally. The court said, "A dying declaration by no means imports a verity. The history of criminal trials is replete with instances where witnesses, even in the agonies of death, have through malice, misapprehension or weakness of mind, made declarations that were inconsistent with the actual facts; and it would be a great hardship to the defendant who is deprived of cross-examination, to hold that he could not explain them." And further along, that "they may be contradicted in the same manner as other testimony." It was also held that the rule requiring a foundation to be laid, to admit evidence of contradictory statements by asking the witness whether he had made such statements, does not apply to statements made by persons since deceased.

On this question, in *Felder v. The State*, 23 Tex. App. 477, after referring to the relaxation of the rule in admitting *ex parte* dying declarations made to friends (and frequently not sworn to), without cross-examination, the Texas court said: "But after admitting them, it would be a perversion of all right reasoning to deny to an accused a like relaxation of the rule. . . ." "If the State may invoke a departure from the ordinary rules of evidence upon the ground of necessity, would it not be a hardship to deny the same to the accused, when the necessity has been put upon him by the concession made to the State?"

In *McPherson v. The State*, 9 Yerger (Tenn.), 279, it was said, . . . "there is no reason why the same principle of law should not be applied to the contradictory statements of persons *in extremis* and those of a person on examination under oath."

The *theoretic cancellation* of contradictory statements by deceased was discussed in *Moore v. The State*, 12 Ala. 764. There were statements both that the defendant did, and did not inflict the mortal wound. The jury was instructed that they neutralized each other, and therefore should be disregarded. This was held to be error, as it took from the jury the privilege of weighing the respective statements; that the defendant was entitled to have the jury pass upon and determine which statements they believed.

Under this head come statements of the declarant in their nature *exculpatory* of the defendant which were frequently objected to on

the ground that they were in the nature of opinions. In *Rex v. Scalfé*, 1 Moo. & Rob. 551, Coleridge, J., admitted this declaration of deceased, "I don't think he would have struck me if I had not provoked him."

In *Haney v. Commonwealth*, 5 Crim. Law Mag. 47, the trial court excluded evidence of the following statements of deceased which defendant offered to prove, which ruling was held to be error by the Supreme Court of Kentucky. That "he (deceased) brought it all on himself; he did not blame John Haney (defendant) for shooting him; he alone was to blame; I did not think the negro would kill me; I brought it all about myself; I was to blame for the whole thing." While apparently opinion and conclusion seemed to be interwoven in these statements it was held, that from the necessities of the case, they should have been admitted for several reasons, which may be summarized as follows:

1. It was not merely opinion but was essentially a statement of fact, being the expression of a participant in the affair, whose opportunity for knowing whether he was to blame was better than that of any other person.

2. The statements go to explain deceased's intent and motive, and mainly are expressions of his own understanding of the actual facts, and of the part he took, and greatly assist the jury in understanding the true nature of the affair.

3. The strong probability that the declarant at the point of death, in making admissions against himself and in favor of the defendant would tell the truth.

4. Had the declarant been alive, at the trial he could have been examined as to his participation in the difficulty, his intentions, motives, understanding and statements explanatory of them.

It is somewhat difficult for those who have not been initiated into the mysteries of jurisprudence of the occult variety to comprehend how there could be any serious divergence from this doctrine of common-sense and fairness; how courts could, as they sometimes do, ignore it; for instance as the Iowa court in a recent case (*State v. Sale*, 119 Iowa, 1, 92 N. W. Rep. 680, Dec. 19, 1902), did, in affirming the exclusion of an offer to prove that the deceased made a dying statement "to the effect that he was to blame in the difficulty between them, and that defendant had to do what he did." Reason as well as a spirit of "fair play" would suggest that such statements be received and examined for what they are worth. If they prove to be unreliable they will have little weight; but if they bear evidence of serious and intelligent expression, they will have and should have great influence. It is a one-sided rule that admits, as is generally done, such mixed statements of fact, conclusion and opinion of the dying declarant as these—that defendant "cut" or "shot" declarant "for nothing"—that declarant "was not doing a thing"—that "he (defendant) had no cause for it whatever"—that "It was done without provocation"—that it was "willful" and "malicious," and other like ones, and yet rejects the declarant's expressions of similar character, based upon his personal observation and knowledge of the facts, that the defendant was not to blame, or that he was compelled by force of circumstances to do what he did.

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Wrong principles urged for excluding prior impeaching statements of dying declarant. In *State v. Stuckey*, 56 S. C. 576, 35 S. E. Rep. 263 (1900), it was held that according to the established doctrine of that court, that prior admissions and statements of the declarant not under oath, and not made *in extremis*, are not competent to be received to explain or contradict his dying declarations. Let us analyze this erroneous doctrine: Deceased makes dying declarations incriminating the defendant, but before any trouble arose—before there was any necessity for any dying declarations—before there was any necessity for any sworn evidence—before there was incentive to arouse antipathies, blinding passions, or to suggest doubtful motives, the declarant had made other statements and admissions antagonistic to certain features of his dying declarations. The objection that they were not made in expectation or fear of death is unreasonable and futile. It is really a playful invention, for it was an impossible condition, when there was no suggestion of death at that time. It would be requiring a foolish as well as an impossible condition, that the prior admissions should have been made in fear of death. In fact, the absence of the fear of death instead of detracting from the value of those admissions only gave them greater weight, as showing that having been made before the exciting conditions arose, they were more likely to disclose the untainted truth than even the *dying* declarations.

As to the point that they were not sworn to, neither were the dying declarations sworn to; and had the declarant survived and been a witness, then there could have been no valid objection to proving his prior admissions and statements, and there is no good reason why they should not be received even though he is dead.

This anomalous and narrow rule is opposed to the broader, more sensible and better established doctrine which found expression in *Carver v. United States*, *supra*, to the effect that dying declarations "may be contradicted in the same manner as other testimony."

But the court to justify its illogical position wanders into the byways of empirical syllogisms, namely: that whereas the deceased declared that defendant shot him without notice or cause, and whereas defendant said that before he fired the shot, the deceased with threatening words drew a pistol on him, and that whereas the jury found a verdict for *manslaughter only*, that therefore the alleged admissions of deceased as well as his dying declarations, were immaterial, because, if the jury had believed the deceased they would have convicted defendant of *murder*, and if they had believed defendant they would have acquitted him. If such medieval sophisms were to be generally adhered to, they would render nine-tenths of the evidence in all cases nugatory, and would lead to the substitution of quirks, conclusions and fortune-telling methods for evidence. The assumptions of the court were false in fact as well as in theory. Beyond doubt, the jury *did believe* the dying declarations, but with a grain of allowance. They probably gave some slight weight to defendant's testimony—probably summed up the matter, that there was something of an excited collision, that neither party was wholly without fault. There are varying degrees of culpability and varying opinions about it. The jury believed the dying de-



clarations in part, and it is barely possible, that if they had heard the excluded admissions, they might have believed less of them.

This is not a world of neatly designed certainties, of finely molded events made to order from perfect models, but on the contrary, is from center to circumference, full of defects, mishaps, surprises and raging, discordant antagonisms, and the balancing element of compromise, must, of necessity, enter into most all sensible judgments.

These remarks have a more extended application, for occasionally, in considering other questions, courts have indulged in similar sophistries, jumping at theoretic and arbitrary conclusions as to what juries must have *precisely believed or not believed* in arriving at verdicts.

*A singular case and doubtful precedent.* Maxcy G. Lee, a physician, was convicted of killing his father, Henry Lee, also a physician, seventy years of age and in good circumstances. The son had lived with the father five years, both of them practicing medicine in partnership. Generally their relations were of a very cordial and affectionate character, the son watching the father with tender care when he was unwell. Both were of irascible and passionate disposition and had occasional violent quarrels which were followed by speedy reconciliation. The son had borrowed a very fine shotgun to hunt with, of intricate mechanism, which was exhibited to divers persons. On the day of the homicide the son had procured an extension of the lease of the gun and returned home, and had some angry words with the housekeeper, who did not have supper for him and another brother who was with him. The sons and father seemed to be on the best of terms and had a toddy together (the sons had brought a bottle of liquor home with them), and the gun was again discussed, and the colored servant desiring to see it, was told to produce it, he saying that it was unloaded. After it was replaced the servant was sent for the mail which he delivered to the father in the yard, at which time the housekeeper left on account of the previous difficulty, and immediately after the father entered the house the report of a gun was heard, and the father was shot. The father said "as I came down the passage Maxcy shot me from his room door. He was within eight feet of me."

The dying declarations were: "Fannie (his daughter), Max has shot me." "An old man, three score and ten, to raise up a son to kill him in his own house, for nothing—a drunken fool." "Don't you think this is a high state of civilization?" He also stated that the shooting was wilful and malicious.

The son's explanation was that after he received his mail, he sat down on the bed in his own room (across the hall from his father's), and went to working the wonder of a gun, and his father came into the hall in front of him when the gun fired.

The admission of these declarations was sustained. To a distant and cool observer, a suspicion might well arise, that excitement, passion and revenge were more dominant in the mind of the declarant, than the *chastening sense of impending death*, and that such declarations are fraught with greatest dangers of an unathomable character. To justify its opinion on the "*conclusion*" phases, the court says: "Although the deceased did not state the *facts and circumstances* that induced

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him to believe that the shooting was wilful and malicious, nevertheless, there was testimony tending to show facts and circumstances within his knowledge upon which his opinion *might* have been based," such evidence consisting of prior difficulties; one an alleged threat made five or six years before, that one of them would have to die that night, followed by an affectionate comradeship for years, and of a quarrel of a week or two before, followed by the son's present of a gold watch and chain to his father on his birthday, three days before the accident,—which conduct might show irritability and reckless talk rather than malice; and the impulsive, irascible father, surprised at finding himself suddenly fatally shot, and somewhat excited by his toddy, would very readily generate an inflammable torrent of resentful passion which would override his cooler reason. And it would not require a great stretch of imagination to infer, that the son having had too much toddy (at home and before he got home), and no supper, experimenting with a gun he had been told was unloaded, might have accidentally discharged it at the unfortunate moment that his father appeared before his door. *State v. Lee* (1900), 58 S. C. 335, 36 S. E. Rep. 706. (Owing to its length we cannot give the opinion in full, eleven pages being taken up with the statement of the exceptions.)

*The offering of incompetent dying declarations by prosecuting officers condemned.* In *State v. Jefferson* (Dec. 22, 1899), 125 N. C. 712, 34 S. E. Rep. 648, this declaration was received in evidence: "He (Dr. Herring) got the ball out, and after he got it out, he (the deceased) sent for me, and told me to have John Jefferson arrested. That they had had words about tobacco hands and corn, and he had gone off after noon after hands, and had not come back after sunset, when he left. When he got half way down Hominy Hill, somebody shot him. He looked back and saw a man running out of a clump of bushes at a hogpen, but could not recognize him,—too dark to recognize him." After pointing out its incompetence—that "at most, the evidence was but the opinion of the deceased that the prisoner shot him," and the danger of admitting such evidence even though there was considerable other evidence against the defendant, the court proceeded—"And it is a matter of some surprise to us that evidence so clearly incompetent as that which we have recited, should have been offered in the case by the prosecuting officer, and that it should have been received by the court as competent." . . . "But it is evident that the purpose of the prosecuting officer was to give the State the benefit of the opinion of the deceased that the prisoner fired the gun." And further, that a court of last resort could not permit the life of any one to be taken, under the form of law, on incompetent evidence of such a serious nature.

*Opinative dying declarations* were discussed by the Supreme Court of West Virginia in the recent case of *State v. Burnett* (1900), 47 W. Va. 731, 35 S. E. Rep. 983, as follows:

Attention is called to the dying declarations of the deceased, which will, no doubt, be attempted to be proven on a second trial, and which were allowed to be detailed by Dr. Brown in his testimony. Dr. Brown says, in asking Morris about the shooting, and after locating the place

where it occurred, he inquired: "Do you have any idea who shot you?" He said: 'I do. Of course, I do, but I am not sure. I was shot with Burnett's little rifle, and I think Charley Burnett did the shooting.' I said, 'Why do you think that?' He said, 'Because he has threatened to do it.' Then I asked him if he had seen anyone on the road who he would suspicion of having shot him. He said, 'No.' He had told me of a row that he and Mrs. John Hill had had. I says: 'Do you think Mrs. Hill did it?' He said, 'No, she didn't do it.' I says, 'Do you think John did it?' He says, 'No, sir; neither of them didn't do it. They are mean enough, but they didn't do it. I think Charley Burnett did it.'" This is the only testimony that implicates Charley Burnett in the homicide, except the testimony of George Flint, who states that Mrs. Hill told him that Charley and Mose Burnett would be on the mountain, waiting for him. Now, these dying declarations of Dr. Morris were inadmissible, for the following reasons: They were mere declarations of opinion, and would not have been admitted if the deceased had been living, and endeavoring to give this testimony from the witness stand. In 10 Am. & Eng. Enc. Law, 376, 377, under "Dying Declarations," we find: "Dying declarations, being a substitute for sworn testimony, must be such narrative statements as would be admissible had the dying person been sworn as a witness. If they relate to facts which the declarant could have thus testified to, they are admissible. . . . Mere declarations of opinion, which would not be received if the declarant were a witness, are inadmissible. And it is immaterial whether the fact that the declaration is a mere opinion appears from the statement itself, or from other undisputed evidence, showing that it was impossible for the declarant to have known the fact stated." See *Jones v. State*, 52 Ark. 347, 12 S. W. Rep. 704; *Berry v. State*, 63 Ark. 382, 38 S. W. Rep. 1038; and *Rosc. Cr. Ev.*, top page 54, side page 33, where it is said: "So the statement of the deceased must be such as would be admissible if he were alive and could be examined as a witness. Consequently a declaration upon matters of opinion, as distinguished from matters of fact, will not be receivable."—citing *Reg. v. Sellers*, Carr. Supp. Cr. Law, 233.

*Distinctions as to what is fact and what opinion* was discussed in the recent case of *Shenkenberger v. State* (1900), 154 Ind. 630, 57 N. E. Rep. 519, as follows:

Counsel for appellant next insisted that the court erred in admitting in evidence the dying declaration of Belle Shenkenberger, as testified to by H. C. Sheridan. The evidence given by said witness, and appellant's objection thereto, as shown by the record, are as follows: "Q. You may state what she (Belle Shenkenberger) said, now, about the cause of her death. (Defendant, by her counsel, objected to the question for the reason that it is a statement made in the absence of the defendant; that it is merged in the written declaration; that the written statement is the best evidence, if there is one. The court overruled the objection, to which ruling of the court defendant, by her counsel, at the time excepted, and the witness answered.) A. She said: 'I know that my mother-in-law poisoned me. That is the way I meet my death' Q. Did she say anything about its being a strange death to

die? A. to die.' What was law. (D the record conclusio court def dying de presence absence. tified to objection

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die? A. Yes, sir; she gave the expression: "This was a strange death to die." (On motion of defendant, this answer was stricken out.) Q. What was the remainder of that? A. To be poisoned by her mother-in-law. (Defendant, by her counsel, moved to strike the last answer from the record, for the reason that it is the expression of an opinion or conclusion. The court overruled the motion, to which ruling of the court defendant, by her counsel, at the time excepted.) To render a dying declaration admissible, it is not necessary that it be made in the presence of the defendant. It may be, and generally is, made in his absence. There was no evidence or admission that the declaration testified to by said witness was reduced to writing. It is evident that the objection to the first question propounded was properly overruled.

It is argued by counsel, in their brief, that the dying declaration proved by the answer of the witness to the first question was the expression of an opinion or conclusion, and not the statement of a fact. No such objection, however, was made to said testimony in the trial court, and it cannot be made here for the first time. Were the question properly before us, we would feel constrained to decide that the statement "I know that my mother-in-law poisoned me. That is the way I meet my death,"—was, in form, at least, the statement of a fact.

Appellant, by her counsel, moved to strike from the answer to the second question the words, "To be poisoned by her mother-in-law," for the reason that it was the expression of an opinion or conclusion. The overruling of this motion was properly assigned as a cause for a new trial. It is true that matters of opinion contained in a dying declaration are not admissible, and that the statement must be such as would have been competent if the declarant were sworn as a witness. *Montgomery v. State*, 80 Ind. 377; *Boyle v. State*, 97 Ind. 322; *Boyle v. State*, 105 Ind. 469, 5 N. E. Rep. 203; Whart. Cr. Ev. (9th Ed.), § 294. The difficulty is not in determining the rule, but in its application. In *Boyle v. State*, 97 Ind. 322; *Id.*, 105 Ind. 469, 5 N. E. Rep. 203,—the declarant, answering the question, "What reason, if any, had the man for shooting you?"—said: "Not any that I know of. He said he would shoot my damned heart out." It was held that this answer was not the expression of an opinion. In *Brotherton v. People*, 75 N. Y. 159, the deceased at first did not recognize the person, who was disguised, but said, "When he (the latter) drew his pistol and commenced his pranks, he knew it was the prisoner." Held not an opinion, and admissible. In *Wroe v. State*, 20 Ohio St. 460, the declarant, in speaking of the fatal wound, said "It was done without any provocation on his part." The court held that the same was not an expression of an opinion, saying, "Whether there was provocation or not is a fact not stated, it is true, in the most elementary form of which it is susceptible, but sufficiently so to be admissible as evidence." The statement of the deceased in *People v. Abbott* (Cal.), 4 Pac. 769, was that "the man cut him with a knife, and he had no cause for it whatever," and it was held the statement of a fact. The statement of the dying person in *State v. Nettlesbush* 20 Iowa, 257, was in answer to a question whether the shot was accidental or intentional, and the answer was that it was intentional. The evidence was held competent. In *Payne v. State*, 61 Miss.

161, it was held that the statement of the deceased that the defendant shot him without cause was not the expression of an opinion. In *Fuller v. State* (Ala.), 23 So. Rep. 688, the dying declaration was: "Mr. Fuller cut him to death for nothing. That he went to loose the mule, and Fuller came up and cut him in the neck. That his knife was never open, and that he did not cut Fuller's hat." Held admissible. It was held in *State v. Reed* (Mo. Supp.), 38 S. W. Rep. 574, that a dying declaration that the deceased was not armed at the time he was shot by the accused was admissible. In *Sullivan v. State*, 102 Ala. 135, 15 So. Rep. 264, the declaration "He cut me for nothing. I never did anything to him," was admitted. In *Jordan v. State*, 81 Ala. 20, 1 So. Rep. 577, the words were, "Jule shot me and Handy cut me, all for nothing," and were held to be competent as facts. In *Walker v. State*, 39 Ark. 221, the declaration was "Nick Walker shot me." It was proved that the declarant was shot through an auger hole at night. The evidence was held to be competent, and that it was to be dealt with by the jury. In *State v. Clemons*, 51 Iowa, 274, 1 N. W. Rep. 546, the declaration was: "Ed. Clemons shot me. Ain't that right?" Held competent; the court saying that the testimony is to be excluded "only when the declaration shows upon its face that it is a mere opinion;" and that it is for the jury to say, on the whole evidence, if the deceased intended to state a fact. In *State v. Saunders*, 14 Or. 300, 12 Pac. Rep. 441, the declaration was, "He shot me down like a dog," and it was held competent. In *White v. State*, 100 Ga. 659, 28 S. E. Rep. 423, it was decided that the declaration "He shot me down like a dog" was admissible. In *Richards v. State*, 82 Wis. 172, 51 N. W. Rep. 652, a declaration that the declarant was stabbed without provocation was held competent. In *Roberts v. State*, 5 Tex. App. 141, the statement was, "Sam Roberts killed me for nothing." Held the statement of a fact, and not an opinion, and admissible. In *State v. Arnold*, 13 Ired. 184, the declaration was, "A. B. has shot me or killed me, and none other." The court said: "It must be presumed that the declarant intended to state a fact, and not an opinion. That it did not appear that deceased knew or could know the facts seems to go to the credit, and not to the competency, of the declarations. As they purport in themselves to disclose the facts, the court was bound to submit them to the jury." In *State v. Gile*, 8 Wash. 12, 35 Pac. Rep. 417, the declaration, "They butchered me," was held admissible as the statement of a fact. In *State v. Mace*, 118 N. C. 1244, 24 S. E. Rep. 798, the declaration, "He murdered me," was held admissible. In *Lipscomb v. State*, 75 Miss. 559, 23 So. Rep. 210, 230, the declaration, "Dr. Lipscomb has killed me,—has poisoned me with a capsule he gave me to-night,"—was held to be the statement of a fact and not an opinion, and therefore competent testimony. Whitfield, J., speaking for the court as to the admissibility of the dying declaration, said: "Any process of reasoning which seeks to distinguish between the statement, 'Dr. Lipscomb poisoned me with a capsule he gave me to-night,' and 'Dr. Lipscomb killed me or shot me,' seemed to be a refinement not only too uncertain and visionary to serve in the practical administration of justice, but essentially inaccurate." The expression "to be poisoned by my mother-in-law," is a mere repetition of the first part of the declaration, "My mother-in-law

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poisoned me," and is in effect the same. Such expression is no more the statement of an opinion than are the declarations, "He shot me," "He murdered me," "He butchered me," "He cut me," which have been held admissible in many cases. The court, therefore, did not err in overruling the motion to strike the last answer of the witness from the record.

*Praying insufficient.* That deceased at the time "appeared to be suffering and was praying," was not sufficient to render his statements admissible as dying declarations. *Cole v. State*, 105 Ala. 76; 16 So. Rep. 762.

*Other statements by declarant admissible* to show uncertainty as to the identity of the assassin. Deceased made a dying declaration charging defendant with being the guilty party, but defendant was entitled to prove other statements by declarant tending to show that another than defendant committed the crime, and as an impeachment of the dying declarations. *Green v. State*, 154 Ind. 655, 57 N. E. Rep. 637.

*The motive part was improperly admitted.* The admission of this portion of a dying declaration was error. "He said he did not know, unless he killed him for the \$100 he owed him; or unless he had been hired to kill him. He said that . . . Cope had been trying to have him killed." *Feltner v. Commonwealth* (1901), 23 Ky. L. R. 1110, 64 S. W. Rep. 959.

*A similar instance.* It was held that such portions of the dying declarations as these—"I never made any threats against him in my life"—did not think defendant would shoot him, and knew of no reason why he should—"I had not touched a drop of liquor for over a month," should have been excluded. *State v. Parker* (1903), 172 Mo. 191, 72 S. W. Rep. 650.

*It takes more than a J. P.'s certificate to make a valid dying declaration.* Admitted a lengthy written statement certified to by a J. P. as a dying declaration made before him. It recited among other things—"believing I am about to die," etc. It was not signed by the declarant, nor did it appear that it had been read over to him; nor was there evidence given to show that he believed himself to be in imminent danger of death, or that he was without hope of recovery; the justice not being offered as a witness. The admission of this writing was held error; that it was simply a written statement by a person claiming to be a justice, and that the justice's certificate could not take the place of the necessary conditions to render the evidence valid. *Green et al v. State* (1901), 43 Fla. 552, 30 So. Rep. 798.

*A case of inference.* As deceased sat with her back to a window in company with several others, she was shot through the window, but did not see the assassin. Asked who she thought shot her, she answered that she thought the defendant did; that the day before he said he was coming to her house that night, and that if he saw her talking to any other colored man he would shoot her. The admission of this statement was held to be error, notwithstanding there was considerable other evidence against defendant; that desirable as it was to punish such outrages, yet indefinite opinions based on uncertain contingencies could not be received as dying declarations. *Jones v. State* (1901), 79 Miss. 309, 30 So. Rep. 759.



*An erroneous instruction as to the truth-inspiring influence of the fear of death.* In *People v. Corey*, 157 N. Y. 332, 11 Am. Crim. Rep. 487, 51 N. E. Rep. 1024, the jury was instructed that, "It is the experience of mankind that the premonition of immediate death, from which there is no hope of recovery, is always sufficient to influence persons so situated, to speak the truth." The court of appeals held this to be error, and said there was no such positive presumption in law, and that it was not the experience of mankind that persons in expectation of immediate death always told the truth.

*An instruction from which it may be inferred that the jury should take the dying declarations as part of the evidence, should also tell the jury that they must determine the fact as to whether such statements are dying declarations and under what conditions they were made.* *Bush v. State*, 109 Ga. 120, 34 S. E. Rep. 298.

*The taking of dying declarations to the jury room was condemned in* *Dunn v. People*, 172 Ill. 582, 11 Am. Crim. Rep. 447, 50 N. E. Rep. 137, especially when there have been in evidence contradictory oral statements of declarant.

*When dying declarations have been reduced to writing, the writing is the best evidence, and should be produced or its absence accounted for before parol evidence thereof is admissible.* (Declarations made on one occasion.) *Dunn v. People*, *supra*; *Boulden v. State*, 102 Ala. 78. See also 2 Ark. 36, 11 Iowa, 350, 41 Iowa, 142, 8 Tex. App. 1.

*Other recent cases.* The following are some of the other recent and current cases in which dying declarations have been discussed. *Clemmons v. State*, 43 Fla. 200, 30 So. Rep. 699; *Morrison v. State*, 42 Fla. 149, 28 So. Rep. 97; *Richard v. State*, 42 Fla. 528, 29 So. Rep. 413; *Williams v. State*, 130 Ala. 107, 30 So. Rep. 484; *State v. Dixon*, 131 N. C. 808, 42 S. E. Rep. 944; *Burton v. Commonwealth*, 24 Ky. L. R. 1162, 70 S. W. Rep. 831; *Arnett v. Commonwealth*, 24 Ky. L. R. 1440, 71 S. W. Rep. 635; *Young v. State*, 114 Ga. 849, 40 S. E. Rep. 1000; *State v. Vaughan*, 152 Mo. 73, 53 S. W. Rep. 420; *State v. Mullin*, 170 Mo. 608, 71 S. W. Rep. 221; *State v. Wright*, 112 Iowa, 436, 84 N. W. Rep. 541; *State v. Kuhn*, 117 Iowa, 216, 90 N. W. Rep. 733; *State v. Dennis*, 119 Iowa, 688, 94 N. W. Rep. 235; *People v. Smith*, 172 N. Y. 210, 64 N. E. Rep. 814; *State v. Taylor*, 56 S. C. 360, 34 S. E. Rep. 939; *State v. Head*, 60 S. C. 516, 39 S. E. Rep. 6; *Newberry v. State*, 68 Ark. 355, 58 S. W. Rep. 351; *Castillo v. State* (Tex.), 69 S. W. Rep. 517; *Winfrey v. State*, 41 Tex. Cr. R. 538, 56 S. W. 919; *Harper v. State*, 79 Miss. 575, 31 So. Rep. 195; *Brown v. State*, 78 Miss. 637, 29 So. Rep. 519; *Smith v. Commonwealth*, 23 Ky. L. R. 2271, 67 S. W. Rep. 32; *State v. Wilmbusse* (Id.), 70 Pac. 849; *Fuqua v. Commonwealth*, 24 Ky. L. R. 2204, 73 S. W. Rep. 782; *Hughes v. State*, 109 Wis. 397, 85 N. W. Rep. 333; *Hopkins v. State*, 43 Tex. Cr. R. 261.

Reference to dying declarations in the prior volumes of the American Criminal Reports are as follows: Vol. 1—301, 309; Vol. 2—11, 278, 282, 322; Vol. 3—218, 220, 225; Vol. 4—152; Vol. 6—7, 418; Vol. 7—366; Vol. 8—131, 566; Vol. 10—276, 282; Vol. 11—33, 447, 487.

See, also, 1 McClain on Criminal Law, sections 425-431 inclusive.

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## STATE v. ABLEY.

109 Iowa, 61—77 Am. St. Rep. 765—46 L. R. A. 862—80 N. W. Rep. 225.  
Decided Oct. 3, 1899.

ENTRAPMENT: \* BURGLARY: *Doctrine of consent—Acts of agent and detective—Cross-examination.*

1. One who has knowledge that a burglary is contemplated against his property, does not give consent by simply remaining silent and passively permitting an entry, for the purpose of arresting the intruder.
2. A town marshal acting as a detective secured a key from the clerk of a store, and then permitted the defendant to make an impression from it and thereby construct a new key. Subsequently the marshal informed one of the owners of the store that the defendant had a key and would make an entry into the store that night. Upon the same night the defendant, accompanied by the detective, entered the store, by means of the new key, and carried out goods. The defendant was immediately arrested. *Held*, that although the clerk knew the purpose for which the key was procured, yet as he did not have charge of the building or authority to admit any persons after the store was closed for the night, his act did not amount to consent by the owners.
3. While the court sustained the verdict it emphatically denounces the conduct of the detective and modifies the judgment of the court below by reducing the term of imprisonment from three years to six months.
4. The conduct of the detective "in this whole transaction was so reprehensible and suspicious in character that a wide latitude of cross-examination might have been allowed;" but the court is unable to say that the court below abused its discretion in not permitting cross-examination as to the indebtedness between the witness and the defendant and as to statements made by the witness to the defendant regarding his former life.
5. It is not proper to ask a witness whether he has at some previous time committed a crime.

Appeal from the District Court of Franklin County; Hon. S. M. Weaver, Judge.

The defendant was convicted of burglary, and appeals. Affirmed, but modified.

*Taylor & Evans and E. P. Andrews, for the appellant.*

*H. C. Liggett, J. H. Scales, Milton Remley, Attorney General, and Charles A. Van Vleck, for the State.*

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\*See ENTRAPMENT in Table of Topics.



WATERMAN, J. The building entered was owned by the firm of Schaeffer & Reynolds. No question is made but that defendant broke and entered the store, and took goods therefrom; but it is claimed that he cannot properly be convicted of the offense charged, because the entry was made with the assent of the owners or their agents. The facts upon which this claim is based are as follows: One Clock was marshal of the town in which the building was located. Prior to the commission of the crime, Clock (as he claims, for detective purposes) had been counseling and advising with defendant, not only in relation to this particular offense, but also as to the two breaking and entering other buildings. So zealous was the officer in this questionable line of duty, and so anxious was he to impress defendant with the belief that he was earnest in his criminal intentions and would keep faith in the matters plotted, that Clock alone on one occasion broke and entered another store building, belonging to one Bryan, with a key furnished by defendant, and took from it some goods. Of course, he claims that this was done merely to lead defendant on. Clock testified that the mayor of the town had previous information from him of his intention to enter the Bryan store. The mayor, who was a witness, does not testify on this point; but, however that fact may be, Clock admits that Bryan, the owner, had no such information, and that the entry was effected without his knowledge or consent. One Will Reynolds, a clerk in the employ of Schaeffer & Reynolds, had a key to the building in question in this case. Shortly before the commission of the offense charged, Clock borrowed this key to get an impression from which defendant could make another key which would open the door, and such a key was afterwards made by defendant. At this time Clock told Reynolds, the clerk, the use which he wished to make of the borrowed key, and also of defendant's criminal purpose. The breaking and entering were done in the nighttime. During the day Clock had warned several citizens of the contemplated crime—among others, Schaeffer, a member of the firm which owned the store. He told Schaeffer that defendant had a key to the store, and would enter it that night. He did not, however, tell him where or how the key had been obtained. The persons so warned were requested to be on guard and assist

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in defendant's arrest after the offense was completed. This plan was carried out. Schaeffer and the others watched. Clock and defendant came upon the scene about midnight. Defendant opened the door and entered the store, Clock following. As they came out with the property taken, the defendant was arrested.

One who has committed a criminal act is not entitled to be shielded from its consequences merely because he was induced to do so by another. If there is anything in the defense here, it must be because the entry was assented to by Schaeffer. But the evidence tends strongly to show that Schaeffer, though not objecting, did not personally assent. One who knows of a crime contemplated against him may remain silent and permit matters to go on, for the purpose of apprehending the criminal, without being held to have assented to the act. *People v. Liphardt* (Mich.), 62 N. W. Rep. 1022; *State v. Adams*, 115 N. C. 775, 20 S. E. Rep. 722; *State v. Sneff* (Neb.), 35 N. W. Rep. 220; *Thompson v. State*, 18 Ind. 386; *State v. Jansen*, 22 Kan. 498. The question of the owner's personal assent was left to the jury, and, we think, under instructions that fully and accurately stated the law. But certain instructions were asked by defendant and refused by the court, the thought of which was to predicate the assent of the owner upon the acts of the clerk, Reynolds. The evidence does not show on the part of the members of the firm any knowledge of Reynold's conduct. Of course, if the clerk, with criminal intent, aided in any way in the entry of this building, he would be a party to the crime. But that is not what is claimed by defendant. He contends that if the clerk, though without criminal intent, assented to the entry, such assent will be imputed to the master. Some text-writers lay down the rule in terms broad enough to give support to this contention, and the following cases are cited by counsel as sustaining it: *Reg. v. Johnson*, 41 E. C. L. 123; *People v. Collins*, 53 Cal. 185; *Saunders v. People*, 38 Mich. 218; *People v. McCord*, 76 Mich. 200, 42 N. W. Rep. 1106 (8 Am. Crim. Rep. 117); *Allen v. State*, 40 Ala. 344.

In the California case, the agent of the owner, who was pretending to take part in the burglary, alone entered the building, and the decision was founded on this fact. The other cases are

each based upon one of two states of fact: Either the servant had custody of the building and a right to open it at the time he did, or at the time he assented thereto, or the owner was aware of the part the servant was taking, and acquiesced therein. Neither of these conditions prevailed in the case at bar. It does not appear that Reynolds had charge of the building, or had any right to admit persons therein, after it was closed for the night; and, as we have said, his conduct in the transaction with Clock was unknown to the owners. We do not think the clerk's conduct can be used as a shield for defendant. 1 Bish. Cr. Law (5th ed.), § 262; *State v. Jansen*, 22 Kan. 498. The instructions were rightly refused.

Clock, when on the witness stand, stated on cross-examination that he had owed defendant money. He was then asked whether defendant had been trying to collect it, and also whether the indebtedness still remained. The court sustained objections to these questions. Questions were also ruled out which called for statements made by the witness to defendant as to his (witness') former life, and further sought to elicit an admission from the witness that he had at some previous time committed a crime. This last matter was clearly inadmissible. As to the other testimony sought, the court might properly, in the exercise of its discretion, have received it. Clock's conduct in this whole transaction was so reprehensible and suspicious in character that a wide latitude of cross-examination might have been allowed. But we are not able to say the trial court's discretion was abused. The defendant could not have been prejudiced. The evidence sought was of a collateral nature. So much of it as had a bearing on Clock's motive or feeling towards defendant was made immaterial by the latter's admitted conduct in the transaction of which complaint is made.

We cannot leave this case without again, and in more emphatic terms, expressing our disapproval of the conduct of Clock, who, if he did not suggest, at least encouraged, the commission of the offense by defendant. We are inclined to doubt whether defendant, if left to himself, would have perpetrated the crime of which he has been convicted. Clock stimulated him with advice, aided him by acts, and, through unrelenting efforts, spurred him on to his undoing. This conduct was outrageous,

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if, indeed, it was not criminal, and it is aggravated, rather than excused, by the fact that Clock was a peace officer. Frail human nature is prone enough to crime; it should not be purposely tempted; and in this case, it was urged to act. Defendant was sentenced to imprisonment in the penitentiary for a term of three years. In view of the facts, we shall reduce the term to six months. With this modification, the judgment will be affirmed.

NOTE (by J. F. G.)—Possibly the court gives too narrow a limit to *People v. Collins* (California Case). See short review of that case in notes following *State v. Waghalter*.

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STATE v. WAGHALTER.

177 Mo. 676—76 S. W. Rep. 1028.

Decided Nov. 17, 1903.

ENTRAPMENT: \* *Larceny—Receiving—Consent of owner—Encouragement of crime by detectives condemned—Pleading—Ownership.*

1. If the owner of goods consents to the taking of them by another, though only for the purpose of entrapping and prosecuting the intending thief, his consent prevents the taking from being larceny.
2. A box of goods was taken from a railroad company, the owner, by a detective who at the time was the agent of and in the employment of said company, and the said taking by him was with the full knowledge and consent of said railroad company, and in pursuance of a previous arrangement between the railroad company, and said agent, to entrap the driver of a transfer wagon, and the defendant, who was suspected of receiving goods stolen from the company. The goods were delivered to the driver by said employee, who was not known to be a detective by the driver, and although he suspected at the time that the goods were stolen or being stolen by said agent, upon being requested and persuaded by the detective to so do, the driver conveyed the goods to defendant's store. *Held*, that the taking was not felonious, and there having been no larceny defendant could not be guilty of receiving stolen goods.
3. The ownership of the stolen goods in the railroad was established by an allegation in the indictment charging it to be the owner.
4. The court condemns the conduct of a detective in actually encouraging the commission of a crime in order to apprehend an offender.

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\*See ENTRAPMENT in Table of Topics.

Appeal from St. Louis City Circuit Court; Hon. W. B. Douglas, Judge.

Adolph Waghalter, convicted upon a charge of receiving stolen property, appeals. Reversed.

*Thos. B. Harvey* (*S. S. Bass*, of counsel), for appellant.

Upon the doctrine of entrapment they cited: *Clark's Crim. Law*, p. 260; 1 *Bish. New Cr. Law*, sec. 263; *Rapalje on Larceny*, sec. 224; *Hughes' Cr. Law and Proc.*, sec. 2428; *Love v. People*, 160 Ill. 508; *People v. McCord*, 76 Mich. 200 (8 Am. Crim. Rep. 117); *Connor v. People*, 18 Colo. 373; *Williams v. State*, 55 Ga. 391 (1 Am. Crim. Rep. 413); *Rex v. McDaniel*, Foster, 121; 18 Am. and Eng. Ency. Law (2d ed.), 472; *Pigg v. State*, 43 Tex. 108; *O'Brien v. State*, 6 Tex. App. 665; *Johnson v. State*, 3 Tex. App. 593; *People v. Clough*, 59 Cal. 438; *Speiden v. State*, 4 Utah, 407; *Allen v. State*, 40 Ala. 334; *Speiden v. State*, 3 Tex. App. 156; *State v. Douglass*, 44 Kan. 618; *State v. Jansen*, 22 Kan. 498; *People v. Collins*, 53 Cal. 185.

*Edward C. Crow*, Attorney General, and *Bruce Barnett*, for the State.

GANTT, J. The defendant was indicted in the Circuit Court of the city of St. Louis, together with Samuel Waghalter, for receiving stolen goods, knowing them to have been stolen, to wit, one box of clothing of the value of \$740.50, from the Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

A severance was granted, and on his separate trial defendant was convicted, and sentenced to the penitentiary for three years. From that sentence he appeals.

The facts are practically undisputed. On the 28th of July, 1901, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, commonly known as the "Big Four," received at its freight house in East St. Louis, Ill., a box or case of clothing of the value of \$740.50, addressed and consigned to Seelig & Co., Kansas City, Mo., billed to be delivered to the Missouri Pacific Railway Company for transportation over the remaining distance to Kansas City. In the usual course of business, this box was to be transported to the Missouri Pacific Railway freight office by the St. Louis Transfer Company, a common carrier,

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which was in the business of transferring freight from one connecting railroad to another.

In order to keep a record of the transportation of this freight in this manner, a uniform system was in operation between all of the railroads running into East St. Louis and the transfer company, by which the railroad company delivering the freight to the transfer company made out duplicate tickets showing the box or bundle of freight, with the number and name of the consignee; and when each bundle was delivered to the transfer company wagon, the driver thereof signed one of these tickets as a receipt to the railroad for the delivery of the goods, and the other ticket was given to the driver of the wagon, who, under his instructions, would, upon the delivery of the goods to the other or connecting railroad, get the signature of that company to that ticket for the delivery of the freight, and this ticket would be returned by the driver of the transfer company's wagon to the first company, so that, when a railroad sent freight through this transfer company to a connecting line, it would have receipts therefor, or acknowledgment of the delivery thereto, both from the transfer company and from the railroad company which had received the freight.

All of the employees, both of the Big Four Railroad and of the transfer company, had strict instructions neither to deliver nor receive freight except upon compliance with the above rule.

These tickets referred to were, in the course of business and under the fixed rule of the Big Four, delivered by a delivery clerk to a person known as a "picker"—an employee whose business it was, upon the receipt of the tickets in duplicate, to search or pick out the articles or boxes of freight designated by such tickets, and to deliver the same to the driver of the wagon of the transfer company.

The evidence showed that a trucker would actually load or assist in loading the freight on the wagon, but for practical purposes *the picker* would deliver the goods to the driver of the transfer company.

The testimony shows that from about the latter part of June, 1901, until the 31st day of July, 1901, the prosecuting witness, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, popularly known as the "Big Four," had in its employ



and pay a Thiel detective, named C. V. Brown, under the disguise of a picker of freight on the platform of said railroad company at East St. Louis, in the State of Illinois; that said detective was employed and sent over to East St. Louis to do work as a detective for and in behalf of the Big Four Railroad, under the mask of a picker of said Big Four Railroad, as a result of a conference between Mr. Neel, local superintendent or agent of said railroad company at East St. Louis, with the witness C. A. Peterson, vice-president of the Thiel Detective Agency, his services as such detective being paid for by said railroad company, the prosecuting witness herein, and during said services the agent of said railroad company was conferring with the Thiel Detective Agency in regard to the work done and to be done by said detective agency; that said Brown, as such picker of freight, had the authority to designate what parcels should be loaded upon the various wagons from the platform of said railroad company, and thereupon assisted the trucker in placing said parcels upon the trucks and the wagons, said picker being furnished with tickets by the checkers indicating the pieces to be transferred.

On the afternoon of July 30, 1901, Detective and Picker Brown selected and caused to be placed upon the wagon of one Joe Mack, a driver for the St. Louis Transfer Company, several pieces of freight, and, among others, a large box, the same being the case of clothing referred to in the indictment in this case, and told Mack to "bring it to the Sheeneys on Franklin avenue" (referring to the store of appellant's father); that Mack did not wish to accede to Brown's request unless Brown gave him a ticket for the box, but that Brown told him that he had "sent a bill over in the morning," and finally persuaded Mack to do with the box as he had requested, though Mack believed that the box was stolen or being stolen by Brown, Mack at the time not knowing or suspecting the true character of Brown as a detective in the employ of said railroad company.

Thiel's Detective Agency had been notified by telephone that the wagon and box were on their way over, and said agency in turn notified the police department of St. Louis, so that when Mack drove the wagon up to Waghalter's premises on Franklin avenue, in St. Louis, between 4 and 5 o'clock in the afternoon, there were four city detectives and four Thiel detectives in the

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immediate vicinity, watching for said wagon, and, as soon as the box had been rolled off the wagon and into Waghalter's store, they all closed in upon Mack, the Waghalters, and the box; and, after searching the premises for the avowed object of trying to discover other alleged stolen property, the Waghalters and Mack and the box and wagon were taken to the Four Courts, where they and the detectives and officers immediately or very soon thereafter were joined by the attorney and officials of the railroad company and of the transfer company.

While under arrest at Waghalter's store, Officer Gaffney put certain questions to Mack, the driver, relative to whether he (Mack) had any ticket for the box; and appellant objected to such statements as not being made in the presence of appellant, and as being hearsay, and made while both Mack and appellant were under arrest, and under circumstances not requiring appellant to make a reply, even if he had heard Mack's statements, and appellant saved his exceptions to the ruling of the court; and at the same time the court permitted Officer Gaffney to state: "We looked around then to see if we could see any other stolen goods in the house," appellant objecting on the ground that witness should not be permitted to testify to his conclusions that said box was stolen, or that other stolen goods were likely to be found in said premises, and appellant saved his exceptions to the ruling of the court. Officer Shannon, over the objection of appellant, was permitted to testify to Mack's statement made to him while on their wagon on the way to the Four Courts, appellant Waghalter not being with them; said statement being with reference to how Mack had obtained the box of goods; the court ruling that such statement was competent to show that the box was stolen; and appellant duly saved his exception to this ruling. Again, after arriving at the Four Courts, Mack made a statement to Mr. Tufts, superintendent of the St. Louis Transfer Company (nobody being present except themselves), with reference to how, where, and why he had taken said box of goods; and, notwithstanding the objection of appellant that such statement was hearsay and not in any sense binding upon this appellant, the court overruled the objection, and held that said statement of Mack was competent, as tending to show "whether or not the property was stolen."

The State was permitted, over the objection of appellant, to

put in evidence a written, signed statement made by the driver, Mack, in the office of the chief of detectives at the Four Courts; the court again ruling that said statement of the alleged thief was competent, as tending to show that the property had been stolen.

The appellant offered in evidence the statutes of Illinois upon the subject of jurisdiction of courts, and with reference to larceny, as charged in indictment No. 165, in the case of *The People of Illinois v. Joseph Mack et al.*, whereupon the circuit attorney waived the reading of said statutes, and admitted that the Circuit Court of the county of St. Clair, State of Illinois, had jurisdiction of the subject-matter and person of Joseph Mack and others, and said indictment, and the offense charged therein. Thereupon the appellant offered in evidence a duly authenticated transcript of the record of the Circuit Court of the Third Judicial Circuit, held in St. Clair county, in the town of Belleville, in the State of Illinois, the same being record of indictment No. 165, and in the cause of *The People of Illinois v. Joseph Mack et al.*; and an objection by the State that said transcript of record was incompetent and immaterial was sustained by the court, and appellant duly saved his exceptions. Said transcript of record of the Illinois court is set out in full, and shows that Joe Mack was placed upon trial on the 27th day of January, 1902, at Belleville, Ill., for stealing on the 30th day of July, 1901, "one case of clothing," and that at the conclusion of the testimony on behalf of the State the court instructed the jury to find the defendant not guilty. It had already been proved during the course of the State's testimony that the Joe Mack referred to in the aforesaid indictment and transcript of record was the same Joe Mack who was placed upon trial at Belleville, in the State of Illinois, and the same Joe Mack who had received the box from Detective Brown on the afternoon of July 30, 1901, from the platform of the Big Four Railroad Company at East St. Louis, and subsequently, during the same afternoon, was arrested at the premises of Waghalter, the appellant herein, while delivering the box there, and that the case of clothing referred to in the indictment in this cause is the same box of clothing for the alleged stealing of which at East St. Louis on the 30th day of

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July, 1901, Joe Mack was placed upon trial and acquitted at Belleville on the 27th day of January, 1902.

It had also appeared from the testimony of the aforesaid witnesses in this cause that they also had given their testimony at the trial of Joe Mack at Belleville, and that the aforesaid C. V. Brown, the detective who operated at East St. Louis under the guise of a picker for and on behalf of the Big Four Railroad, and who delivered the box to Mack, had testified at the aforesaid trial of Mack at Belleville.

Defendant offered a demurrer at the close of the State's case on general and special grounds, and, among others, that the evidence showed no trespass and larceny of property by Joe Mack, which was overruled.

Among the instructions asked by defendant and refused by the court were the following:

"(6) The court instructs the jury that if the person referred to in the testimony as Brown, and as being a freight picker for the railroad company named in the indictment, induced and persuaded the transfer driver, named Mack, to take and steal the property in question, then said taking was with such consent of the owner's agent as will deprive said taking of said property of felonious trespass and intent, and said property so taken was not stolen, and the jury should acquit this defendant.

"(7) The court instructs the jury that larceny cannot be committed when the owner or his agent consents to the taking and asportation of the property, though such consent may be given for the purpose of apprehending the party who so takes said property."

(1) "To constitute larceny, the taking must be either actually or constructively without the owner's consent."

While generally private persons cannot license crimes, and it is no palliation or excuse that a wrongdoer had anybody's permission, there are exceptions to this general rule, because there are certain acts which the law makes criminal *when and because done without consent*, the doing of which with consent is not legally reprehensible. 1 Bishop's New Crim. Law, § 258.

Thus a man may give away his property. Therefore another who takes it by his permission does not commit larceny.

It is an ancient and established rule of the common law that

there can be no larceny without a trespass. In 2 East, P. C., larceny is defined as "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place with a felonious intent to convert them to his (the taker's) own use, and make them his own property, *without the consent of the owner.*" [*Reg. v. Holloway*, 1 Den. C. C. 370; *Id.*, 2 Car. & K. 942; *Witt v. State*, 9 Mo. 673; *State v. Gray*, 37 Mo. 463.]

"A person does not consent to his property being taken merely by negligently or purposely leaving it exposed, or failing to resist the taking, even though he may know that another intends to come and steal it; but if he does consent to a taking, though only for the purpose of entrapping and prosecuting the intending thief, his consent would prevent the taking from being larceny, and it is immaterial in such case that the person taking the property does not know that the owner consents." Clark's Crim. Law, p. 260, and citations.

Neither is it "consent for the owner to obtain the aid of a detective, who, for the purpose of detection, joins the defendant in a criminal act designed by the defendant, and carried into execution by actual theft." Rapalje on Larceny, § 224.

"Where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with the owner, it is not a crime." *Love v. People*, 160 Ill. 508, 509, 43 N. E. Rep. 710, 32 L. R. A. 139.

In that case Robinson, a detective, entered Hoag's office with the latter's knowledge and consent, and took his money with no intention of stealing it, but in pursuance of a previously arranged plan between him and Hoag; intending solely to entrap the defendant, who had been induced to accompany Robinson on the apparent commission of a burglary. But the Supreme Court of Illinois held that it was clear that no burglary was committed, there being no felonious intent on the part of Robinson in entering the building or taking the money, and, if no burglary by Robinson, because of the absence of a felonious intent, the defendant Love could not have been an accomplice and privy to a burglary. And such is the law in other States. [*Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126; *People*

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In view of the evidence in this case, certain conclusions seem inevitable:

First, that the box of clothing was taken from the possession of the Big Four Railway Company by C. V. Brown, who at the time was the agent of and in the employment of said company, and the said taking was with the full knowledge and consent of said railway company, and in pursuance of a previous arrangement, and was not felonious.

Second, the said taking was instigated by the said C. V. Brown, for the sole purpose of entrapping Mack, the driver, and the Waghalters, to whom he directed the goods to be taken.

Third, it is not a case in which the criminal design originated with the defendants or the driver, Mack.

The courts of last resort of many of the States of our Union have dealt with the question presented by this appeal, and they are unanimous in holding that when the owner consents to, or by his agent assists in, a taking contrived by himself, it is not larceny.

In *Williams v. State*, 55 Ga. 395, Judge Bleckley expresses the consensus of judicial opinion as follows: "It seems to be settled law that traps may be set to catch the guilty, and the business of trapping has, with the sanction of the courts, been carried pretty far. Opportunity to commit crime may, by design, be rendered the most complete, and, if the accused embrace it, he will still be a criminal. Property may be left exposed for the express purpose that a suspected thief may commit himself by stealing it. The owner is not bound to take measures for security. He may repose upon the law alone, and the law will not inquire into his motive for trusting it. But can the owner directly, through his agent, solicit the suspected party to come forward and commit the criminal act, and then complain of it

as a crime, especially where the agent to whom he has intrusted the conduct of the transaction puts his own hand into the *corpus delicti*, and assists the accused to perform one or more of the acts necessary to constitute the offense? Should not the owner and his agent, after making everything ready and easy, wait passively, and let the would-be criminal perpetrate the offense for himself, in each and every essential part of it? It would seem to us that this is the safer law, as well as the sounder morality, and we think it accords with the authorities. [2 Leach, 9, 3; 2 East, P. C. 16, § 101, p. 666; 1 Car. & Mar. 218; 11 Humph. 320; 2 Bailey, 569.] In the present case, but for the owner's incitement through his agent, the accused may have repented of the contemplated wickedness before it had developed into act. It may have stopped at sin, without putting on the body of crime. To stimulate unlawful intentions with the motive of bringing them to punishable maturity is a dangerous practice. Humanity is weak. Even strong men are sometimes unprepared to cope with temptation and resist encouragement to evil."

This court, in *State v. Hayes*, 105 Mo. 76, 16 S. W. Rep. 514, 24 Am. St. Rep. 360, in equally severe terms condemned the conduct of a detective in actually encouraging the commission of a crime in order to apprehend an offender.

Judge Thomas quoted with approval the language of the Michigan Supreme Court in *Saunders v. People*, 38 Mich. 218, as follows: "Human nature is frail enough at best, and requires no encouragement in wrongdoing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation. Desire to commit crime, and opportunities for the commission thereof, would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction." [See, also, *State v. Jansen*, 22 Kan. 498.]

The defendant in this case is charged with receiving stolen goods, knowing them to be stolen. The evidence establishes beyond a peradventure that there was no felonious taking of the goods. The taking and sending the goods from the Big Four station was by that company's own agent, C. V. Brown, and was

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not larceny, because done by its own agent with its own express consent and connivance; and thus an essential ingredient, to wit, the stealing of the goods, is absent, and the State necessarily failed in establishing an essential link in the offense charged. What we have here said is in entire accord with *State v. West*, 157 Mo., loc. cit. 319, 324, 57 S. W. Rep. 1071, inclusive; *State v. Stubblefield*, 157 Mo. 360, 58 S. W. Rep. 337.

The ownership was laid in the railway company, and properly; and we entertain no doubt whatever that its consent, under the circumstances, deprived the taking of a felonious character.

Various other errors are assigned, but as, in our opinion, the undisputed facts preclude the conviction of the defendant, the other assignments become unimportant in this case.

The judgment must be, and is, reversed, and the prisoner discharged.

Fox, J. concurs. BURGESS, J., absent.

NOTES ON THE LAW RELATING TO ENTRAPMENT (by J. F. G.).—In connection with these notes we would suggest the reading of the following: *State v. Waghalter*, *State v. Abley*, in the present volume; also in *Williams v. State*, 1 Am. Crim. Rep. 413; *People v. McCord*, 8 Am. Crim. Rep. 117, and *Roberts v. Territory*, 11 Am. Crim. Rep. 193; also notes by Judge Gibbons in 8 Am. Crim. Rep. 123.

As a general rule it is held that no burglary, robbery or larceny can be committed with the consent of the owner; but the cases go much farther than this general rule. Although consent by the injured party will not legalize that which otherwise would be an assault and battery, yet it has been held that consent upon part of officers will, in some cases, prevent criminality attaching to an act which would otherwise be a crime. It matters not whether the original plan was suggested by a detective, or by the owner of the property involved in the crime; or whether the defendant himself conceived or suggested the act, and was assisted by one in authority, the rule is the same,—that no crime is committed.

*The Saunders Case*.—One of the leading cases upon this subject is *Saunders v. People*, 38 Mich 218. The opinion of Judge Marston is frequently referred to; and his sentiments endorsed. The reversing opinion in that case was rendered by Judge Cooley; but Judge Marston rendered a voluntary opinion which is as follows:

MARSTON, J. I concur in the opinion of my Brother Cooley in this case. I cannot, however, silently permit the extraordinary course adopted by the police officers in this case to pass unnoticed and uncondemned.

It appears that the respondent applied to John F. Webb, a policeman,



who was in charge of the police court in the city of Detroit, and requested him to leave the door of said court room unlocked, as he, Saunders, wanted to get in there to get the O'Neil bonds, and that he, Saunders, would pay Webb for so doing. That in reply thereto Webb informed him that he would consider the matter; that he, Webb, then called upon his superior officer and communicated to him what had taken place; that the latter told Webb to say to respondent he, Webb, would do as desired; that on the same afternoon Webb saw respondent and told him he would leave the door open; that Captain Girardin (the superior officer), Detective Sullivan and Webb posted themselves the night in the office of the clerk of the police court, and while they were there, Benjamin D. Moylan opened the door and entered, and while there they arrested him.

It does not, with sufficient clearness, appear what authority Webb or his superior officer had in the office in question, so that the case as it now stands does not, I think, come within the decisions referred to.

The course pursued by the officers in this case was utterly indefensible. Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his farther debasement. Some courts have gone a great way in giving encouragement to detectives, in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing. The mere fact that the person contemplating the commission of a crime is supposed to be an old offender can be no excuse, much less a justification for the course adopted and pursued in this case. If such were the fact, then the greater reason would seem to exist why he should not be actively assisted and encouraged in the commission of a new offense which would in no way tend to throw light upon his past iniquities, or aid in punishing him therefor, as the law does not contemplate or allow the conviction or punishment of parties on account of their general bad or criminal conduct, irrespective of their guilt or innocence of the particular offense charged and for which they are being tried. Human nature is frail enough at best, and requires no encouragement in wrong-doing. If we cannot assist another and prevent him from violating the laws of the land, we at least should abstain from any active efforts in the way of leading him into temptation. Desire to commit crime and opportunities for the commission thereof would seem sufficiently general and numerous, and no special efforts would seem necessary in the way of encouragement or assistance in that direction.

*A Tennessee Case.*—In *Kemp v. State*, 11 Humph. 320, a conviction for larceny of a slave was reversed; because notwithstanding the fact that the accused himself had originated the idea of the theft, yet im-

piled consequence is stated.

"It appeared that the accused, Harriet Pentecost, had sent her husband, cost told prisoner, prisoner of fred to go and offer self and where it mounted company tentiary fred, and prisoner road; wh Harrison said he was doing about it.

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plied consent by the owner took away the criminality of the theft. The case is stated as follows:

"It appears from the evidence of John C. Pentecost, and the prosecutor Harrison, that on the night of the 12th of July, 1850, the said Pentecost learned that the prisoner had arranged to steal Alfred, and he sent him to his master to tell him what was going on, and Pentecost told Alfred to carry out the agreement between himself and the prisoner, and to take his master's horse from the stable and go to the prisoner on the penitentiary road. The prosecutor at first ordered Alfred to go to the back yard, but upon Pentecost expostulating with him, and offering to manage the affair, the prosecutor consented, and himself and Charles Nichol went out on the penitentiary turnpike road, where it was understood the prisoner and Alfred were to meet. Alfred mounted on a horse and rode on, Pentecost and several others in his company following after. Alfred and the prisoner met on the penitentiary turnpike and rode on together. Harrison, the master of Alfred, and Nichol were concealed beyond the penitentiary, and as the prisoner and Alfred rode up, the former rode ahead of them in the road; whereupon Alfred fled back home, and the prisoner was secured. Harrison inquired of the prisoner why he was stealing his negro? He said he was not trying to steal the boy. He was then asked what he was doing with him. To which he replied, it was then too late to talk about it."

Upon this statement the Supreme Court held:

1. That the slave was obeying the will of his master; and that although he was in the company of the prisoner, who had a felonious intent, yet that the prisoner had no control over him; and hence he was not taken out of the master's possession.

2. That as the slave was not in a situation contrary to the will of his master, there could be no larceny.

*An Alabama Case.*—In *Allen v. State*, 40 Ala. 334, the facts were that the accused proposed to a servant a plan for robbing his employer's office by night. The servant disclosed the plan; and his employer communicated the fact to the police, who instructed the employer to furnish the servant with keys to the office on the appointed night. The servant and the prisoner went together. The servant opened the door with the key and both entered. *Held*, that there could be no conviction of burglary. The court further held that as the evidence indicated that there was no crime committed that the defendant was entitled to his immediate discharge.

*A California Case.*—In *People v. Collins*, 34 Cal. 185, it seemed that the accused had there originally conceived the idea of entering a certain building in the night time, requesting one Parnell to assist him. Parnell immediately informed the sheriff, who, after consultation with the prosecuting attorney, advised Parnell to co-operate with the defendant and carry out the enterprise. This was done. Parnell entered the building, took marked coins and handed several of them to the defendant. *Held*, no burglary was committed. In reversing the judgment the court said:

"If the act of Parnell amounted to burglary, the sheriff who coun-

seled and advised it was privy to the offense; but no one would seriously contend, on the foregoing facts, that the sheriff was guilty of burglary. The evidence for the prosecution showed that no burglary was committed by Parnell, for want of a felonious intent, and the defendant could not have been privy to a burglary unless one was committed."

*A Texas Case.*—In *Speiden v. State*, 3 Tex. App. 156, the court states the case as follows:

"Pinkerton's detective agency, at Chicago, Illinois, obtained, by some means, a number of letters and postal cards written by the defendant, from Dallas, to a friend in Chicago, urging him to come to Dallas and join him in breaking into and robbing some of the banks in the latter city. It appears that Pinkerton forwarded those letters to John Kerr, a banker of Dallas, who immediately called a meeting of the bankers of the city and submitted the matter to them. The result of this meeting was that the bankers requested Pinkerton to send a detective to Dallas to work up the case. Deroso, a sergeant of Pinkerton's force, came, and, after an interview with the bankers, sent back to Chicago for Wood and McGuire, two detective aids, who were to represent themselves to the defendant as professional burglars, and induce him to enter some bank building in the night time, when they would procure his arrest.

"After the arrival of Wood and McGuire, they set to work to carry out this plan, keeping in constant communication with Deroso, and, through him, with the bankers, who were kept constantly informed as to the plans and movements of the parties. Finally, it was agreed on all hands that the banking house of Adams & Leonard should be broken into on Sunday night. Adams & Leonard agreed to the arrangement, and the detectives were, in the adventure, working in their employ.

"Pursuant to the plan agreed upon, Deroso, Hereford, a deputy sheriff of Dallas County, a Mr. Mixon, United States deputy marshal, and another party, entered and took possession of the bank during the daytime, about two or three o'clock on Sunday, to remain therein until the burglary was effected and the defendant was arrested. About one o'clock at night the back door of the bank was forced open by the two detectives, Wood and McGuire, who came in, spoke to the concealed parties, and went into the vault; when, after remaining about an hour, Wood went out, told Speiden, the defendant, they wanted more help, and returned in a short time, and, coming in, closed the door after him. In a minute or two Speiden came in and closed the door, when the officers arrested him."

After reviewing several authorities the opinion concludes as follows:

"In the case at bar the detectives cannot be considered in any other light than as the servants and agents of the bankers, Adams & Leonard. They, the detectives, had the legal occupancy and control of the bank; two of them made arrangements with defendant to enter it; and defendant, when arrested, had entered the bank at the solicitation of those detectives, who were rightfully in possession, with the consent of the owners. This cannot be burglary in contemplation of law, however much the defendant was guilty in purpose and intent."

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"The judgment of the lower court must be reversed and the cause remanded."

*Another Texas Case.*—In *O'Brien v. State*, 6 Tex. App. 665, the accused had been convicted under an indictment based on article 307, of the Criminal Code, charging that he had offered a bribe to a deputy sheriff to cause the release of a prisoner. The court, in reversing the judgment, said:

"Where the officer first suggests his willingness to a person to accept a bribe to release a prisoner in his charge, and thereby originates the criminal intent, and apparently joins the defendant in a criminal act first suggested by the officer, merely to entrap the defendant, the case is not within the spirit of said article 307, of the Criminal Code. The question here presented is one of great difficulty, we are free to admit."

*A Florida Case.*—In *Lowe v. State*, 44 Fla. 449, 32 So. Rep. 956, decided September 24, 1902, the following two paragraphs appear in the syllabus by the court:

"2. A taking by the voluntary consent of the owner, or his authorized servant or agent, even though with a felonious intent, does not constitute larceny.

"3. Where the criminal design to steal originates with the accused, and the owner of the property stolen does not, in person or by an agent or servant, suggest the design, nor actively urge the accused on to the commission of the crime, the mere fact that such owner, suspecting that the accused intends to steal his property, in person or through an agent or servant, exposes the property, or neglects to protect it, or furnishes facilities for the execution of the criminal design, under the expectation that the accused will take the property or avail himself of the facilities furnished, will not, in law, amount to a consent to the taking, even though the agent or servant of such owner by his instructions appears to co-operate in the execution of the crime."

Although this is a recent case, we do not give the opinion, as there is nothing in it that would add to the statement made in the official syllabus. The judgment was reversed.

*A North Carolina Case.*—In *State v. Adams*, 115 N. C. 775, 20 S. E. Rep. 722, William Adams and Susan Adams, his wife, had been convicted upon an indictment for larceny of cotton. It appeared by the evidence that the accused had contemplated stealing cotton from one Palmer; and had requested Julia Harris, a servant of Palmer, to assist them; but she betrayed them. The cotton house was watched for several nights; and then Julia Harris was sent to deliver a sack of cotton to William Adams, with information that another sack was at a particular place in the cotton house. Adams came and took the other sack. The next night the servant told Susan Adams where she had placed a sack of cotton about fifty yards from the cotton house. Susan Adams took this sack of cotton. In the court below the State elected to stand upon the act of William Adams in taking the cotton on Wednesday night. Counsel for the defendant insisted that the court should instruct the jury that there was no evidence of a conspiracy; nor was there evidence sufficient to convict either of the defendants; but the

court overruled these requests. In reversing the conviction the Supreme Court said:

"The court correctly told the jury that 'if there was the guilty intent previously formed by the defendant to steal certain property, and he carried out such design previously formed, he is guilty, notwithstanding the owner of the property was advised of the intended larceny, appointed agents to watch him and could have prevented the theft, but did not do so, and allowed him to commit the theft, with a view of having him subsequently punished.' It was error, however, further to tell them that if there was the previous intent to steal, the defendant would be guilty, notwithstanding the owner's agent had told a servant to go to the defendant's house and persuade him to come and steal the sack. *Dodd v. Hamilton*, 4 N. C. 471; *State v. Jernagan*, 4 N. C. 483. It was also error to refuse the fifth prayer for instruction: 'That larceny cannot be committed when the owner, through his agent, consents to the taking and asportation, though such consent was given for the purpose of apprehending the felon,' and likewise the sixth prayer: 'That larceny cannot be committed unless the thing be taken against the will of the owner.' The object of the law is to prevent larceny by punishing it, not to procure the commission of a larceny that the defendant may be punished."

*An Illinois Case.*—*Love v. People*, 160 Ill. 501, 43 N. E. Rep. 710, 32 L. R. A. 139. In the latter part of 1894 and early part of 1895 several robberies and burglaries occurred in the city of Momence. A detective agency of the city of Chicago was employed, and it sent a detective to investigate and ferret out the criminals. The detective suspected certain persons, and suggested to them that they should engage in the commission of various crimes. The court says: "Day after day and night after night his efforts were not directed to the arrest of criminals, but his mental powers and robust health, with the use of money, were directed towards an effort to make criminals of these young men. With plenty to drink and smoke and eat at his expense, he sought to undermine and dazzle their mental and moral strength and lead them into the commission of crime. Ambitious, doubtless, to succeed in his chosen pursuit, with him the conviction of those theretofore guilty was less an object, than that he might fasten on some one the commission of a crime. If he could make the criminal and induce the commission of the crime and cause the arrest of the actor, or throw around him a web of circumstances that would lead to conviction, it would redound to the glory of his chief and cause his advancement. With him the end justified the means, and the reputation of the agency to which he belonged and his own advancement were apparently his object. Such means and agents are more dangerous to the welfare of society than are the crimes they were intended to detect and the criminals they were to arrest."

A plan was laid to burglarize the office of one Hoag. Hoag knew that his office was to be entered and his safe opened and acted in concert with the detectives. The detective took a leading part in the transaction that followed. The office was entered and money taken. Shortly after Love was arrested and marked money was found upon him. He was convicted, but the Supreme Court reversed the judgment, citing

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several authorities to the effect that no burglary was committed. In the closing part of the opinion the court said:

"Strong men are sometimes unprepared to cope with temptation and resist encouragement to evil when financially embarrassed and impoverished. A contemplated crime may never be developed into a consummated act. To stimulate unlawful intentions for the purpose and with the motive of bringing them to maturity so the consequent crime may be punished, is a dangerous practice. It is safer law and sounder morals to hold, where one arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, that no crime is thus committed. The owner and his agent may wait passively for the would-be criminal to perpetrate the offense, and each and every part of it, for himself, but they must not aid, encourage or solicit him that they may seek to punish."

It will be noticed, that although in this instance, the detective originated the scheme, yet, that the doctrine announced applies to that class of cases where the accused in the first instance suggests the commission of a crime. There is a striking similarity between the opinion in this case and that of *Williams v. State*, 55 Ga. 391, 1 Am. Crim. Rep. 413, quoted from in the *Waghalter Case* in the present volume.

*Another Illinois Case.*—The case of *City of Evanston v. Myers*, 172 Ill. 266, 50 N. E. Rep. 204, is not in full harmony with the *Love Case*; but the *only* authority cited in the opinion is that of *Grimm v. United States* (which will be reviewed hereafter), where the Supreme Court of the United States ratified the trick of a postoffice inspector in securing obscene pictures to be sent through the mail for the purpose of prosecuting the sender. In the case of *City of Evanston v. Myers*, a prosecution had been brought before a justice of the peace of Evanston upon a charge of selling beer contrary to an ordinance. The justice imposed a fine and the case was appealed to the Criminal Court of Cook County and tried before Judge Brentano, who gave judgment in favor of the defendant; because the sale of the beer was induced by detectives in the employ of the city of Evanston. An appeal was taken to the Appellate Court, which affirmed the judgment of Judge Brentano (70 Ill. App. 205); but upon appeal to the Supreme Court, the judgments of both the Criminal Court and Appellate Court were reversed. The reasoning of the Appellate Court is in line with the general current of authorities; and as the reports of that court are of limited circulation, we will here give the opinion in full:

*The Appellate Court Case.*—*City of Evanston v. Myers*, 70 Ill. App. 204.

Mr. Justice Waterman delivered the opinion of the court:

The offense for which appellee was prosecuted was one induced by the city of Evanston. It is quite true that there is reason to believe that appellee was ready and willing to violate the ordinance, without being solicited by the city to do so; this is not, however, sufficient to constitute an offense. Parties cannot be convicted of criminal offenses merely because they have the ability and are suspected of a willingness to violate the law.

It appears that the city employed *two minors*, furnished them with



money with which to buy beer of appellee, and this having been done, permitted these boys to go to an ice house behind a church and drink the beer.

The act of appellee was induced by appellant. Indeed, it is not too much to say that appellant not only induced, but sought to have appellee violate its ordinance. Having procured the commission of an offense, appellant now seeks to compel the payment of money, a fine, to it; to reap a reward for its diligence in inducing appellee not only to violate its ordinance, but the law of the State against selling liquor to minors.

The distinction between employing detectives to ferret out and ascertain who has been guilty of crime, and endeavoring to bring about the commission of criminal acts, is so obvious as not to require comment.

The ordinance forbids the giving away of cider, weiss beer, or any vinous, fermented or malt liquor. Can it be claimed that the city could impose a fine upon one who at its request gave wine or cider to a guest?

We do not mean to be understood as intimating that if a citizen of Evanston purchased beer within the city, or received it as a gift, the vendor or donor may not be convicted, although the object of the recipient in receiving was to prosecute him from whom the intoxicant was obtained.

Neither a public officer nor a municipality may procure or encourage the commission of crime. *Love v. People*, 160 Ill. 501; *Saunders v. People*, 38 Mich. 222; *United States v. Whittier*, 5 Dill. 35; *Williams v. State of Georgia*, 55 Ga. 395; *People v. McCord*, 76 Mich. 206.

The judgment of the Criminal Court is affirmed.

*The Grimm Case.*—*Grimm v. United States*, 156 U. S. 604, 15 Sup. Ct. Rep. 470. In this case the Supreme Court of the United States sustained a conviction for sending obscene literature and pictures through the mail; although it appeared that they were sent to a fictitious address in answer to a decoy letter from a postoffice inspector. In passing upon this feature of the case the court said:

"A final matter complained of grows out of these facts: It appears that the letters to defendant—the one signed 'Herman Huntress,' described in the second count, and one signed 'William W. Waters,' described in the fourth count—were written by Robert W. McAfee; that there were no such persons as Huntress and Waters; that McAfee was and had been for years a postoffice inspector in the employ of the United States, and at the same time an agent of the Western Society for the Suppression of Vice; that for some reasons not disclosed by the evidence McAfee suspected that defendant was engaged in the business of dealing in obscene pictures, and took this method of securing evidence thereof; that after receiving the letters written by defendant, he, in the name of Huntress and Waters, wrote for a supply of the pictures, and received from defendant packages of pictures which were conceded to be obscene. Upon these facts it is insisted that the conviction cannot be sustained, because the letters of defendant were deposited in the mails at the instance of the Government, and through the solicitation of one of its officers; that they were directed and mailed to fictitious persons, that no intent can be imputed to defendant to

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convey information to other than the persons named in the letters sent by him, and that as they were fictitious persons there could, in law, be no intent to give information to any one. This objection was properly overruled by the trial court. There has been much discussion as to the relations of detectives to crime, and counsel for defendant relies upon the cases of *United States v. Whittier*, 5 Dill. 35; *United States v. Matthews*, 35 Fed. Rep. 890; *United States v. Adams*, 59 Fed. Rep. 674; *Saunders v. People*, 38 Mich. 218, in support of the contention that no conviction can be sustained under the facts in this case.

"It is unnecessary to review these cases, and it is enough to say that we do not think they warrant the contention of counsel. It does not appear that it was the purpose of the postoffice inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business. The mere facts that the letters were written under an assumed name, and that he was a Government official—a detective, he may be called—do not of themselves constitute a defense to the crime actually committed. The official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such government official. The authorities in support of this proposition are many and well considered. Among others reference may be made to the cases of *Bates v. United States*, 10 Fed. Rep. 92, and the authorities collected in a note of Mr. Wharton, on page 97; *United States v. Moore*, 19 Fed. Rep. 39; *United States v. Wight*, 38 Fed. Rep. 106, in which the opinion was delivered by Mr. Justice Brown, then district judge, and concurred in by Mr. Justice Jackson, then circuit judge; *United States v. Dorsey*, 40 Fed. Rep. 752; *Commonwealth v. Baker*, 155 Mass. 287, in which the court held that one who goes to a house alleged to be kept for illegal gaming, and engages in such gaming himself for the express purpose of appearing as a witness for the Government against the proprietor, is not an accomplice, and the case is not subject to the rule that no conviction should be had on the uncorroborated testimony of an accomplice; *People v. Noelke*, 94 N. Y. 137, in which the same doctrine was laid down as to the purchaser of a lottery ticket, who purchased for the purpose of detecting and punishing the vendor; *State v. Jansen*, 22 Kan. 498, in which the court, citing several authorities, discusses at some length the question as to the extent to which participation by a detective affects the liability of a defendant for a crime committed by the two jointly; *State v. Stickney*, 53 Kan. 308. But it is unnecessary to multiply authorities. The law was actually violated by the defendant; he placed letters in the postoffice which conveyed information as to where obscene matter could be obtained, and he placed them there with a view of giving such information to the person who should actually receive those letters, no matter what his name; and the fact that the person who wrote under these assumed names and received his letters was a Government detective in no manner detracts from his guilt."

A remarkable feature in this case is, that aside from the Federal de-

cisions, *Saunders v. People*, 38 Mich. 218, is the only case mentioned in the opinion, as being unfavorable to the conclusion of the court. If others had been presented in argument, it is probable that the court would have mentioned them in the opinion. It does not seem probable that, had the court been advised, or cognizant, of the great range of authorities upon this subject, it would have based its opinion so largely on those of the United States district judges whose decisions not only should not be received as authority in a court of final review, but may to some degree have been influenced by the surroundings of the trial court, together with the acquaintance naturally existing between a trial judge and other Federal officials.

In the official report of the case the briefs of counsel are not reviewed; accordingly, it does not appear that any other authorities were cited, than those in the opinion. Had the case been fully presented, the court might have arrived at a different conclusion.

The same doctrine was followed by the United States Supreme Court in the following cases: *Goode v. United States*, 159 U. S. 663; *Rosen v. United States*, 161 U. S. 29; *Andrews v. United States*, 162 U. S. 420; *Price v. United States*, 165 U. S. 311; but they were really based upon the *Grimm Case*; so that substantially they add nothing to the weight of that case.

*Liquor Cases.*—In *Blakie v. Linton*, 18 Scottish Law Rep. 583, it was held that where money was given to a woman, by an officer, to buy intoxicating liquor for the purpose of instituting a proceeding against the seller, that no action could be maintained. In *City of Chicago v. Kennedy*, 27 Chi. L. News, 243, 6 Chi. L. J. (monthly) 173, Judge Chetlain dismissed a prosecution against a druggist, based upon a sale of liquor to a detective. He rendered a very well considered opinion. In *People v. Murphy*, 93 Mich. 41, 52 N. W. Rep. 1042, the Supreme Court of Michigan held that where a private individual, without any promptings from an official, purchased liquor for the purpose of prosecuting the seller, that such entrapment was no defense; but it is strongly indicated in the opinion that the rule is otherwise when the act is done by, or through, the suggestion of, an official; a distinction not noticed in reviewing cases in the *Grimm Case*.

*A Colorado Case.*—*Connors v. People*, 18 Colo. 373, 33 Pac. Rep. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295. In this case a detective becoming acquainted with some parties who were ready and willing to enter into plans for robbing express trains, entered into a combination and agreement with them for robbing a certain express train. He then caused them to be indicted for conspiracy. They were convicted; but the conviction was reversed in a very well-considered opinion, upon the ground that the doctrine of entrapment applied to the case; and in fact, therefore, no conspiracy was entered into.

*Other Authorities.*—Clark's Criminal Law, 11; East's Crown Law, 735; 3 Rice on Evidence, 526; Foster's Crown Law, 121; *United States v. Whittier*, 5 Dill. 35; *United States v. Adams*, 59 Fed. Rep. 674; *McGee v. State*, 66 S. W. Rep. 562; *Regina v. Johnston*, 1 C. & M. 218; *Varner v. State*, 72 Ga. 745.

*Approved Instructions.*—See *State v. Waghalter*, in present volume, and "A North Carolina Case," in these notes.

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## IN RE TOD.

12 S. D. 386—47 L. R. A. 566—81 N. W. Rep. 637.

Decided January 18, 1900.

**EXTRADITION:**\* *Executive warrant—Duty of court on habeas corpus—Defective accusation—Fugitive from justice defined—Governor must act in person.*

1. A person cannot be extradited unless he is a fugitive from justice and has been charged with crime in the State from which he fled.
2. The executive warrant is *prima facie* proof, but not conclusive proof, that the requirements of the statute were complied with before the issuance of the warrant.
3. Upon the hearing of a writ of *habeas corpus*, when the question is properly presented, it is the duty of the court to inquire into the facts as to whether there was a proper showing for the executive warrant.
4. The affidavit forming the accusation, made in the demanding State, is in this instance found to be irregular, both in substance and form, and not sufficient to constitute a basis for extradition proceedings.
5. The accused who is charged with defrauding, left the State of Nebraska and came to South Dakota at the request of the persons said to have been defrauded. He returned for the purpose of settlement and then again left by request, as he previously had done. Held, that under such circumstances, he could not be a fugitive from justice.
6. On the Governor, personally, devolves the duty of examining the papers, passing upon their validity, etc. This cannot be delegated to another person; and as in this case the warrant purporting to be signed by the Governor, was in fact signed by another person, it is void.

Appeal from the Circuit Court; Lawrence County; Hon. Joseph B. Moore, Judge.

Grant Heatly Tod, upon the hearing of a writ of *habeas corpus*, was remanded in the custody of the sheriff, and his motion for new trial being overruled, he appeals. Reversed, and an order made for his discharge.

C. E. Davis, for the appellant.

John L. Pyle, Attorney General, for the respondent.

CORSON, J. On July 21, 1899, Grant Heatley Tod presented a petition to the honorable judge of the Circuit Court of the

\*See EXTRADITION in Table of Topics.

Eighth Judicial Circuit, in and for the county of Lawrence, setting forth that since the 16th day of September, 1898, he had been a resident of said Lawrence County; that he was then unlawfully restrained of his liberty by the sheriff of Lawrence County, who claimed some right to retain him; and that such detention was unlawful—and praying that he (said petitioner) might be forthwith discharged from custody. Thereupon the said circuit judge issued a writ of *habeas corpus*, commanding the said sheriff of Lawrence County to produce before him the body of said Tod, together with the cause of his detention. The sheriff made return that he detained the petitioner under and by virtue of an extradition warrant purporting to be issued by the Executive of this State; also, a warrant of arrest purporting to be issued by the said Executive of this State, directed to the sheriff, coroner, or any other peace officer of Lawrence or any other county of this State; a requisition purporting to be issued by the Executive of the State of Nebraska; and a warrant purporting to be issued by the county judge of York County, State of Nebraska. To this return the petitioner interposed a demurrer, which was overruled. Thereupon the petitioner filed an answer, in which he denied that he was a fugitive from justice from the State of Nebraska, and alleged "that at the time of leaving the State of Nebraska, on the 17th day of September, 1898, your petitioner acted through the request of the officers and agents of the York Mining & Development Company, Limited; that on or about the 15th day of May, 1899, at the request of the York Mining & Development Company, your petitioner visited the City of York, Nebraska, and while there all accounts and business was fully and finally settled and approved by the said company; that thereafter your petitioner was specially requested to return to the State of South Dakota, as the employee of the said company, and thereupon the said company purchased and delivered to this petitioner transportation to go from the City of York, Nebraska, to the City of Deadwood, and it was in pursuance of the business of the said company, and not as a fugitive from justice from the State of Nebraska that your petitioner has returned to the State of your petitioner's residence." The petitioner further alleged, "upon information and belief, that the warrant set forth in the return of the re-

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spondent, W. I. Lancaster, the agent of the State of Nebraska to receive and transport your petitioner to the State of Nebraska; and the warrant in said return directing the sheriff of Lawrence County, South Dakota, to arrest your petitioner, were not executed by his excellency, Andrew E. Lee, Governor of the State of South Dakota; that on the 18th day of July, 1899, at the time said warrants purport to be signed, the said Andrew E. Lee was at the town of Vermilion, in South Dakota, and never saw the said warrants, or either of them, nor did he upon that day see the agent of the State of Nebraska, W. I. Lancaster, or read the requisition of the Executive of the State of Nebraska requiring the surrender of your petitioner as a fugitive from justice, but that each of the said warrants have been theretofore signed by the Governor of the State of South Dakota in blank, and were filled out by other persons than the said Governor of the State of South Dakota, and that the said papers were never read or seen by the Executive after the said blanks were filled out, and before the same were delivered to W. I. Lancaster, agent of the State of Nebraska; and for the reasons aforesaid the said warrants, and each of them, were at the time of the delivery thereof, and at all times have been, and now are, illegal and void." The answer also contained a copy of the affidavit or complaint alleged to have been made before the county judge of York County, in the State of Nebraska, upon which the requisition of the Governor of the State of Nebraska was based. The circuit judge at the close of the hearing made an order remanding the petitioner to the custody of the said sheriff. A motion was made to the Circuit Court to vacate and set aside said order, and to grant the petitioner a new trial, which was denied; and from the order denying the same the petitioner has appealed to this court.

The counsel for the petitioner and appellant contends (1) that the affidavit or complaint upon which the requisition issued by the Governor of the State of Nebraska was based does not charge an offense; (2) that there was no evidence before the Governor of this State or before the court tending to show that he was a fugitive from justice; (3) that the extradition warrant purporting to be issued by the Governor of this State, as well as the warrant for his arrest, never in fact having been is-

sued by the Executive of this State personally, is null and void; and (4) if there was any proof before the Executive of this State tending to show that the appellant was a fugitive from justice, that evidence was clearly overcome by the proof of the appellant on the hearing that he was not a fugitive, and that he was not a subject for extradition under the law of Congress. The grounds for holding the appellant and remanding him to the custody of the sheriff of Lawrence County were not stated by the judge in his order, and hence what those grounds were are matter of conjecture. The learned circuit judge evidently overlooked the requirement of section 7843, Comp. Laws (*Habeas Corpus Act*), which provides, "It shall be the duty of the court or judge remanding him to make out and deliver to the sheriff or other person to whose custody he shall be remanded, an order in writing stating the cause or causes of remanding him."

The attorney general takes the position in this court that it was not competent for the circuit judge to proceed further in the examination of the case upon the writ of *habeas corpus* than to determine whether or not the extradition warrant purporting to have been issued by the Executive of this State was sufficient in form, and stated the facts required to be stated in such a warrant to authorize the appellant to be held and taken to the State of Nebraska, and that it was not competent for the court to enter into an investigation as to whether or not an offense was charged, or whether or not the appellant was a fugitive from justice, or whether or not the warrant purporting to be issued by the Governor was in fact issued by him. Upon the questions presented the decisions of the courts have not been in entire harmony, but we are of opinion that the weight of authority is in favor of the doctrine that all of these questions may be investigated by the court or judge authorized to issue the writ of *habeas corpus*, and that it is his duty to investigate them, when properly presented, and that he is not conclusively bound by the action of the Executive in issuing his extradition warrant. The law of Congress providing for the extradition of fugitives from justice provides as follows: "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces

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a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from which the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs and expenses incurred in the apprehending, securing and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory." Section 5278, Rev. St. U. S. Under the provisions of this section the party sought to be extradited must be charged with the commission of a crime, and be a fugitive from justice, to authorize the Executive of the State upon whom the demand is made to issue his warrant.

In *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544, the Supreme Court of the United States says: "It must appear, therefore, to the Governor of the State to whom such a demand is presented, before he can lawfully comply with it: First, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit certified as authentic by the Governor of the State making the demand; and, second, that the person demanded is a fugitive from the justice of the State, the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. The second is a question of fact, which the Governor of the State upon whom the demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative



judgment of this court. It is conceded that the determination of the fact by the Executive of the State in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption is its favor is overthrown by contrary proof." *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250, 12 Am. & Eng. Ency. Law (2d ed.), p. 601; 8 Ency. Pl. & Prac., p. 823. It must also be affirmatively shown that he is a fugitive from justice, and such fact should be recited in the extradition warrant. In the warrant issued in this case the only recital upon this subject is that the "said Grant H. Tod, alleged to be within the jurisdiction of this State, is a fugitive from the justice of the State of Nebraska." Undoubtedly the warrant of the Governor would be *prima facie* sufficient to prove that all the necessary prerequisites of the statute have been complied with prior to its issue by him, but this *prima facie* case may be overcome by competent evidence on the part of the person sought to be held upon the *habeas corpus* proceeding. Upon this question the Supreme Court, in *Roberts v. Reilly*, *supra*, says: "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process, to answer for his offense, he has left its jurisdiction, and is found within the territory of another."

The affidavit in this case, or the so-called complaint, made against the appellant in the State of Nebraska, is apparently insufficient to warrant the holding of appellant, and his extradition to the State of Nebraska. The affidavit or complaint is exceedingly lengthy, and no useful purpose would be subserved by reproducing it in this opinion. The authorities are quite harmonious in holding that the affidavit, indictment, or information upon which the party is sought to be held must charge a public offense; and, as we have seen, this is a question of law

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for the judge or court to determine upon the *habeas corpus* proceeding. In this case the complaint or affidavit is entitled as follows: "In the District Court of York County, Nebraska. State of Nebraska, Plaintiff, vs. Grant H. Tod, Defendant. Complaint. State of Nebraska, York County—ss." And it proceeds: "This complaint of H. C. Page, made before me, M. M. Wildman, county judge of said county, who, being first duly sworn, deposes and says that Grant H. Tod on or about the 15th day of September, 1898, in the county of York, State of Nebraska, intending unlawfully to cheat and defraud the York Mining & Development Company, Limited, did then and there falsely, knowingly, designedly, and unlawfully pretend," etc. The affidavit or complaint then proceeded to set out certain pretenses by which the company was induced to enter into a contract with him in regard to certain mining operations in South Dakota, and concludes as follows: "Subscribed and sworn to before M. M. Wildman, County Judge. Filed July 14th, 1899. M. M. Wildman, County Judge." It was also shown on the hearing that by the laws of the State of Nebraska the County Court and the District Court are different courts of record, and a judge of one of said courts does not exercise the functions of a judge of the other, or interchangeably. It was further shown that informations in that State must be prosecuted by the prosecuting attorney. It will thus be seen that the proceeding is a very irregular one, and apparently not authorized by the laws of the State of Nebraska. But in addition to this irregularity, which would probably vitiate the whole proceeding, the so-called complaint itself would seem to be insufficient, in that it states no public offense. But, in the view we take of the case, it is not necessary to discuss this question at this time.

On the hearing of the *habeas corpus* proceeding it was clearly shown by the appellant that he came to this State at the request of the said mining company, and in May, 1899, he returned to Nebraska at their request, and had a final settlement with the company, and again returned to this State, upon the special request of the said company. Certainly under these circumstances the appellant could not be regarded as a fugitive from justice. Leaving that State, and coming to this State upon the

request of the party alleged to have been defrauded, remaining here a number of months in its employ, returning to that State for the purpose of a settlement, and again coming back to this State, not only with the knowledge, but at the special request, of the said company, negatives the alleged fact that he is a fugitive from justice. While it may not be necessary, to make a person a fugitive from justice, that he should leave the State where the offense is alleged to have been committed, with the intention or for the purpose of avoiding a prosecution, still we think it must appear that he left the State without the knowledge or consent, actual or implied, of the parties alleged to have been defrauded. Liberal as the rule laid down by the Supreme Court of the United States is, in holding parties to be fugitives from justice, the appellant would not come within that rule.

It was also shown on the hearing that the warrant purporting to be signed by the Executive of this State was never in fact issued by him, but was issued by some person other than the Governor. The duty of examining requisition papers, passing upon their validity, and issuing his warrant devolves upon the Governor personally. It is a power that cannot be delegated to any other person. The liberty of the citizen is involved, and he can only be restrained of that liberty by the personal act of the Governor, upon whom the power has been conferred by the Constitution and laws of the United States, and the Constitution and laws of this State. The execution of the power requires careful examination of the requisition papers, and involves the exercise of a sound judgment, aided, in case of necessity, by the advice of the attorney general of the State. The liberty of the citizen would be in great danger if any person could be allowed to issue such extradition warrants in the absence of the Governor.

We are clearly of the opinion that the Circuit Judge erred in remanding the appellant to the custody of the sheriff of Lawrence County, and that the Circuit Court erred in not vacating and setting aside the order made by the circuit judge. The order of the Circuit Court is reversed, and that court is directed to enter an order discharging the appellant from custody.

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## HYATT v. PEOPLE, etc., ex rel. CORKRAN.

188 U. S. 691—23 Sup. Ct. Rep. 456—47 Law Ed. 657.

Decided February 23, 1903.

**EXTRADITION:** \* *Fugitive from justice—Essentials as a basis for a requisition—Extradition warrant—Review by writ of habeas corpus.*

1. The provisions of the United States Constitution, in relation to interstate extradition, is not self-acting; but was made operative by the act of Congress of February 12, 1793, which is substantially retained by the Revised Statutes, section 5273.
2. A fugitive from justice is one who being present in a jurisdiction where the crime is committed, flees from such jurisdiction. To be constructively present is not sufficient; for one who was not actually present, cannot fly from justice.
3. One who was not present in a State at the time when a crime was committed; but subsequently entered the State on business and then left it, is not a fugitive from justice.
4. An extradition warrant should not issue, unless the documents presented by the Governor making the requisition, show that the accused was present in the demanding State at the time of the alleged crime, and that he thereafter fled from such State, and sought refuge in the State upon which the demand is made; and that he is lawfully charged by indictment found, or by affidavit before a magistrate.
5. The question as to whether the person so demanded is substantially charged with a crime is a question of law which on the face of the papers is open to inquiry, on a writ of *habeas corpus*.
6. Whether or not the accused is a fugitive from justice is a question of fact, to be passed upon by the Governor upon whom the demand is made.
7. The extradition warrant is but *prima facie* authority to arrest and hold the accused. It is competent for the accused, upon the hearing of a writ of *habeas corpus*, to show by conclusive evidence, or admissions made, that the warrant was issued without sufficient proof on the assumption of simply constructive presence, instead of actual presence, within the demanding State at the time of the crime charged.
8. The uncontradicted evidence of the relator, being that he was not present in the demanding State at the time of the alleged crime, which fact was also admitted by a stipulation of counsel, *held*, that he was not a fugitive from justice, and that the extradition warrant was improperly issued.
9. In the absence of proof to the contrary, the date of the alleged crime as charged in the indictment, will be accepted as correct.

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\*See EXTRADITION in Table of Topics.

Error to the Court of Appeals of the State of New York to review the judgment of that court discharging Charles E. Corkran from arrest under an extradition warrant. (*People ex rel. Corkran v. Hyatt*, 172 N. Y. 176, 64 N. E. Rep. 825, 60 L. R. A. 774.) Argued January 7, 1903. Affirmed.

Statement by Mr. Justice Peckham:

This proceeding by *habeas corpus* was commenced by the relator, defendant in error, to obtain his discharge from imprisonment by the plaintiff in error, the chief of police in the city of Albany, State of New York, who held the relator by means of a warrant issued in extradition proceedings by the Governor of New York. The justice of the Supreme Court of New York, to whom the petition for the writ was addressed, and also, upon appeal, the Appellate Division of the Supreme Court of New York, refused to grant the relator's discharge, but the Court of Appeals reversed their orders and discharged him. 172 N. Y. 176, 64 N. E. Rep. 825. A writ of error has been taken from this court to review the latter judgment.

The relator stated in his petition for the writ that he was arrested and detained by virtue of a warrant by the Governor of New York, granted on a requisition from the Governor of Tennessee, reciting that relator had been indicted in that State for the crime of grand larceny and false pretenses, and that he was a fugitive from the justice of that State; that the warrant under which he was held showed that the crimes with which he was charged were committed in Tennessee, and the relator stated that nowhere did it appear in the papers that he was personally present within the State of Tennessee at the time the alleged crimes were stated to have been committed; that the Governor had no jurisdiction to issue his warrant, in that it did not appear before him that the relator was a fugitive from the justice of the State of Tennessee, or had fled therefrom; that it did not appear that there was any evidence that relator was personally or continuously present in Tennessee when the crimes were alleged to have been committed; that it appeared on the face of the indictments accompanying the requisitions that no crime under the laws of Tennessee was charged or had been committed. Upon this petition the writ was issued and served.

The return of the plaintiff in error, the chief of police, was

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to the effect that the relator was held by virtue of a warrant of the Governor of New York, and a copy of it was annexed.

The Governor's warrant reads as follows:

STATE OF NEW YORK, }  
Executive Chamber. }

The Governor of the State of New York to the chief of police, Albany, N. Y., and the sheriffs, undersheriffs, and other officers of and in the several cities and counties of this State authorized by subdivision 1 of section 827 of the Code of Criminal Procedure to execute this warrant:

It having been represented to me by the Governor of the State of Tennessee that Charles E. Corkran stands charged in that State with having committed therein, in the county of Davidson, the crimes of larceny and false pretenses, which the said Governor certifies to be crimes, under the laws of the said State, and that the said Charles E. Corkran has fled therefrom and taken refuge in the State of New York; and the said Governor of the State of Tennessee having, pursuant to the Constitution and laws of the United States, demanded of me that I cause the said Charles E. Corkran to be arrested and delivered to Vernon Sharpe, who is duly authorized to receive him into his custody and convey him back to the said State of Tennessee; which said demand is accompanied by copies of indictment and other documents duly certified by the said Governor of the State of Tennessee to be authentic and duly authenticated and charging the said Charles E. Corkran with having committed the said crimes and fled from the said State and taken refuge in the State of New York.

You are hereby required to arrest and secure the said Charles E. Corkran wherever he may be found within this State and thereafter and after compliance with the requirements of section 827 of the Code of Criminal Procedure to deliver him into the custody of the said Vernon Sharpe, to be taken back to the said State from which he fled, pursuant to the said requisition; and also to return this warrant and make return to the executive chamber within thirty days from the date hereof of all your proceedings had thereunder, and of the facts and circumstances relating thereto.

Given under my seal and the privy seal of the State, at the



capital in the city of Albany, this 13th day of March, in the year of our Lord one thousand nine hundred and two.

[L. s.]

B. B. Odell, Jr.

By the Governor: James G. Graham,

Secretary to the Governor.

No other paper was returned by the chief of police bearing upon his right to detain the relator. Upon the filing of the return the relator traversed it in an affidavit, in which he denied that he had committed either the crime of larceny or false pretenses, or any other crime, in the State of Tennessee. He denied that he was within the State of Tennessee at the times mentioned in the indictment upon which the requisition of the Governor was issued; he alleged that he had read the indictments before the Governor of the State of New York, upon which the warrant of arrest was issued, and that they charged him with the commission of the crime of larceny and false pretenses on the 20th and 30th days of April, the 8th day of May, and the 17th and the 24th days of June, 1901. The relator in his affidavit also asserted that he was not in the State of Tennessee at any time in the months of March, April, May or June, or at any time for more than a year prior to the month of March, 1901, and he denied that he had fled from the State of Tennessee, or that he was a fugitive from the justice of that State. He further therein stated that he had heard read the papers accompanying the requisition of the Governor of Tennessee to the Governor of New York, and that those papers did not contain any evidence or proof that he had been in the State of Tennessee at any stated time since the 26th and 27th days of May, 1899, and they contained no evidence or proof that he was in the State of Tennessee on any day in any of the months set forth in the indictments when the crime or crimes were alleged to have been committed.

Upon the hearing the following paper, signed by the respective attorneys for the parties, was filed:

"It is conceded that the relator was not within the State of Tennessee between the 1st day of May, 1899, and the first day of July, 1901. It is also conceded that the relator was in the State of Tennessee on the 2d day of July, 1901."

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There is also another stipulation in the record, signed by the attorneys, and reading as follows:

"The following additional facts are hereby conceded, and the same shall be incorporated in the appeal record herein, as a part thereof, and shall constitute a part of the record upon which the appellant division may hear and determine the appeal herein; *i. e.*—

"It is hereby stipulated by and between the parties to the above entitled special proceeding that three indictments were attached to the requisition papers sent by the Governor of the State of Tennessee to the Governor of the State of New York for the extradition of Charles E. Corkran; that each of the said indictments was found on the 26th day of February, 1902, and that the alleged crimes were charged in said indictments to have been committed on the 1st day of May, 1901, on the 8th day of May, 1901, and on the 24th day of June, 1901, respectively."

Upon the hearing before the judge on March 17, 1902, the relator was sworn without objection, and testified that he had been living in the State of New York for the past fourteen months; that his residence when at home was in Lutherville, Maryland; that he was in the city of Nashville, in the State of Tennessee, on July 2, 1901, and (under objection as immaterial) had gone there on business connected with a lumber company in which he was a heavy stockholder; that he arrived in the city on July 2, in the morning, and left about half-past seven in the evening of the same day, and while there he notified the Union Bank & Trust Company (the subsequent prosecutor herein) that the resignation of the president of the lumber company had been demanded and would probably be accepted that day. After such notification, and on the same day, the resignation was obtained, and the Union Bank & Trust Company was notified thereof by the relator before leaving the city on the evening of that day; that he passed through the city of Nashville on the 16th or 17th of July thereafter on his way to Chattanooga, but did not stop at Nashville at that time, and had not been in the State of Tennessee since the 16th day of July, 1901, at the time he went to Chattanooga; that he had never lived in the State of Tennessee, and had not been in that State between the 26th or 27th of May, 1899, and the 2d day of July, 1901.

Upon this state of facts the judge, before whom the hearing was had, dismissed the writ and remanded the relator to the custody of the defendant Hyatt, as chief of police. This order was affirmed without any opinion by the Appellate Division of the Supreme Court, 72 App. Div. 629, but, as stated, it was reversed by the Court of Appeals, 172 N. Y. 176, and the relator discharged.

*Mr. Robert G. Sherer and Mr. J. Murray Downs*, for the plaintiff in error.

*Mr. William S. Bryan, Jr., and Mr. A. de R. Sappington*, for the defendant in error.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court.

By clause 2 of section 2 of article IV of the Constitution of the United States it is provided:

"A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

It was held in *Commonwealth of Kentucky v. Dennison, Governor*, 24 How. 66, 104, that this provision of the Constitution was not self-executing, and that it required the action of Congress in that regard. Congress did act by passing the statute, approved February 12, 1793. 1 Stat. 302. The substance of that act is reproduced in section 5278 of the Revised Statutes, as follows:

"Sec. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person had fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive author-

ity making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory."

The proceedings in this case were under this section, and the warrant issued by the Governor was sufficient *prima facie* to justify the arrest of the relator and his delivery to the agent of the State of Tennessee. Certain facts, however, must appear before the Governor has the right to issue his warrant. As was said in *Roberts v. Reilly*, 116 U. S. 80, 95, it must appear to the Governor, before he can lawfully comply with the demand for extradition, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or an affidavit, etc., and that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand. It was also stated in the same case that the question whether the person demanded was substantially charged with a crime or not was a question of law and open upon the face of the papers to judicial inquiry upon application for a discharge under the writ of *habeas corpus*; that the question whether the person demanded was a fugitive from the justice of the State was a question of fact which the Governor upon whom the demand is made must decide upon such evidence as he might deem satisfactory. How far this decision might be reviewed judicially in proceedings in *habeas corpus*, or whether it was conclusive or not, were, as stated, questions not settled by harmonious judicial decisions nor by any authoritative judgment of this court, and the opinion continues as follows:

"It is conceded that the determination of the fact by the Executive of the State in issuing his warrant of arrest, upon a demand made upon that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

In *People v. Brady*, 56 N. Y. 182, it was held that the courts:

have jurisdiction to interfere by writ of *habeas corpus* and to examine the grounds upon which an executive warrant for the apprehension of an alleged fugitive from justice from another State is issued, and in case the papers are defective and insufficient, to discharge the prisoner.

In the case before us the New York Court of Appeals held that if upon the return to the writ of *habeas corpus* it is clearly shown that the relator is not a fugitive from justice, and there is no evidence from which a contrary view can be entertained, the court will discharge the person from imprisonment, but that mere evidence of an *alibi*, or evidence that the person demanded was not in the State as alleged, would not justify his discharge, where there was some evidence on the other side, as *habeas corpus* was not the proper proceeding to try the question of the guilt or innocence of the accused. And the court also held that the conceded facts showed the absence of the accused at the time when the crimes were, if ever, committed, and the demand was in truth based upon the doctrine that a constructive presence of the accused in the demanding State at the time of the alleged commission of the crime was sufficient to authorize the demand for his surrender.

We are of opinion that the warrant of the Governor is but *prima facie* sufficient to hold the accused, and that it is open to him to show by admissions, such as are herein produced, or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the State at the time the crime was, if ever, committed. This is in accordance with the authorities in the States, cited in the opinion of Judge Cullen in the New York Court of Appeals, and is, as we think, founded upon correct principles. *Robb v. Connolly*, 111 U. S. 624, recognizing authority of States to act by *habeas corpus* in extradition proceedings.

If upon a question of fact made before the Governor, which he ought to decide, there were evidence *pro* and *con*, the courts might not be justified in reviewing the decision of the Governor upon such question. In a case like that, where there was some evidence sustaining the finding, the courts might regard the decision of the Governor as conclusive. But here, as we have the testimony of the relator (uncontradicted) and the stipulation

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of counsel as to what the facts were, we have the right and it is our duty on such proof and concession to say whether a case was made out within the Federal statute justifying the action of the Governor. It is upon the statute that the inquiry must rest.

In the case before us it is conceded that the relator was not in the State at the various times when it is alleged in the indictments the crimes were committed, nor until eight days after the time when the last one is alleged to have been committed. That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof or offer of proof to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the State at the times named in the indictments, and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the State when the crimes were, if ever, committed.

The New York Court of Appeals has construed the stipulation as conceding these facts, and we think that its construction of the stipulation is the correct one.

It is, however, contended that a person may be guilty of a larceny or false pretense within a State without being personally present in the State at the time, therefore the indictments found were sufficient justification for the requisition and for the action of the Governor of New York thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the State of Tennessee at the time of the commission of those acts for which he had been indicted, assuming that he committed them outside of the State.

The exercise of jurisdiction by a State to make an act committed outside its borders a crime against the State is one thing,

but to assert that the party committing such act comes under the Federal statute, and is to be delivered up as a fugitive from the justice of that State, is quite a different proposition.

The language of section 5278, Rev. Stats., provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the State which demands his surrender. It speaks of a demand by the executive authority of a State for the surrender of a person as a fugitive from justice, by the executive authority of a State *to which such person has fled*, and it provides that a copy of the indictment found, or affidavit made before a magistrate of any State, charging the person demanded with having committed treason, etc., certified as authentic by the Governor or chief magistrate of the State or Territory *from whence the person so charged has fled*, shall be produced, and it makes it the duty of the executive authority of the State *to which such person has fled* to cause him to be arrested and secured. Thus the person who is sought must be one who has fled from the demanding State, and he must have fled (not necessarily directly) to the State where he is found. It is difficult to see how a person can be said to have fled from the State in which he is charged to have committed some act amounting to a crime against that State, when in fact he was not within the State at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the State at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a State, one who has not been in the State at the time when, if ever, the offense was committed, and who had not, therefore, in fact fled therefrom.

In *Ex parte Reggel*, 144 U. S. 642, 651, it was stated by Mr. Justice Harlan, in speaking for the court:

"The only question remaining to be considered, relates to the

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alleged want of competent evidence before the Governor of Utah, at the time he issued the warrant of arrest, to prove that the appellant was a fugitive from the justice of Pennsylvania. Undoubtedly, the act of Congress did not impose upon the executive authority of the Territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the Territory was not required, by the act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the Governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the Executive of the demanding State, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the Executive of the State or Territory where the accused is found the duty of surrendering him, although he may be satisfied, from incontestible proof, that the accused had, in fact, never been in the demanding State, and therefore could not be said to have fled from its justice. Upon the Executive of the State in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State."

To the same effect is *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291. In that case the issue was made about the presence of the party in the demanding State at the time the act was alleged to have been committed, and there was direct and positive proof before the Governor of Georgia, upon whom the demand had been made, and there was no other evi-



dence in the record which contradicted it. It was said (p. 97, L. ed., p. 549, Sup. Ct. Rep., p. 300.):

"The appellant, in his affidavit, does not deny that he was in the State of New York about the date of the day laid in the indictment, when the offense is alleged to have been committed, and states, by way of inference only, that he was not in that State on that very day; and the fact that he has not been within the State since the finding of the indictment is irrelevant and immaterial."

It is clear that it was regarded by the court as essential that the person should have been in the State which demanded his surrender at the time of the commission of the offense alleged in the affidavit or indictment, and that it was a fact jurisdictional in its nature, without which he could not be proceeded against under the Federal statute.

*Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40, decides nothing to the contrary. In that case the party was arrested in Illinois on account of a crime which, it was alleged, had been committed by him in Wisconsin. He sued out a writ of *habeas corpus* in Illinois to test the legality of his arrest under the circumstances appearing in the case. Upon the hearing the court decided the arrest to be legal, and the party arrested acquiesced in this disposition of the case, and made no attempt to obtain a review of the judgment in a Superior Court. It was not until after his arrival in Wisconsin, whither he was taken by virtue of the warrant issued by the Governor of Illinois, and after his trial had begun in Wisconsin, that he made application to the Circuit Court of the United States in Wisconsin to be released upon *habeas corpus*, upon the ground he had originally urged, that he was not a fugitive from justice within the meaning of the Constitution and laws of the United States. The court decided against him, holding that he had been properly surrendered. This court said that, assuming that the question might be jurisdictional when raised before the Executive or the courts of the surrendering State, that it was presented in a somewhat different aspect after the person had been delivered to the agent of the demanding State, and had actually entered the territory of that State and was held under the process of its courts. And it was said that the authorities tended

to support the theory that the executive warrant has spent its force when the accused has been delivered to the demanding State; that it is too late for him to object even to jurisdictional defects in his surrender, and that he was rightfully held under the process of the demanding State. Whether the claim made by the party brought to Wisconsin that he was illegally arrested in Illinois was well founded or not, this court did not feel called upon to consider, or to review the propriety of the decision of the court below, and this on the ground that it was proper to wait until the State court had finally acted upon the case, and then to require the accused to sue out his writ of error from this court to the highest State court where a decision could be had, instead of determining the question summarily on *habeas corpus*.

It is contended, however, that there are cases in this court which sustain the proposition maintained by the plaintiff in error herein, and *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717, is referred to as authority. It is therein held that the words "treason, felony, or other crime," spoken of in the Constitution, included every offense forbidden and made punishable by the laws of the *State* where the offense is committed, and it is therefore argued that as an act committed outside its borders may, under certain circumstances, become a crime against the State, a person thus committing such an act comes within the meaning of the Constitution, and should be surrendered upon demand of the Governor of the *State* whose law he is alleged to have violated.

On looking at that case it is seen that the facts were wholly different, and the court had no such case as the one before us in mind. The party against whom the demand was made had committed the crime, as alleged, within the State of Kentucky, and no question arose as to his liability to be returned to Kentucky for any act done by him outside its borders. The Governor of Ohio, upon whom the demand was made, acting under the advice of his attorney general, refused to surrender the fugitive because the crime alleged was neither treason nor felony at common law, nor was it one which was regarded as a crime by the usages and laws of civilized nations, and the Governor was advised that obviously a line must be somewhere drawn

distinguishing offenses which did, from offenses which did not, fall within the scope of the power granted by the Constitution. It was in regard to this contention that this court held as stated. Mr. Chief Justice Taney, delivering the opinion of the court, said (p. 99, L. ed., p. 726):

"The words 'Treason, felony, or other crime,' in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State. The word 'crime' of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called 'misdemeanors,' as well as treason and felony. 4 Bl. Com. 5, 6, and note 3, Wendell's ed. But as the word 'crime' would have included treason and felony, without specially mentioning those offenses, it seems to be supposed that the natural and legal import of the word, by associating it with those offenses, must be restricted and confined to offenses already known to the common law and to the usage of nations, and regarded as offenses in every civilized community, and that they do not extend to acts made offenses by local statute, growing out of local circumstances, nor to offenses against ordinary police regulations. This is one of the grounds upon which the Governor of Ohio refused to deliver Lago, under the advice of the attorney general of that State.

"But this inference is founded upon an obvious mistake as to the purposes for which the words 'treason and felony' were introduced. They were introduced for the purpose of guarding against any restriction of the word 'crime,' and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice.

"This compact, ingrafted in the Constitution, included, and was intended to include, every offense made punishable by the law of the State in which it was committed, and that it gives the right to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found; that the right given to 'demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of

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the crime charged, or to the policy or laws of the State to which the fugitive has fled."

The court, however, held that while it was the duty of the executive authority of Ohio under the circumstances to deliver the person demanded, and that such duty was merely ministerial and the Governor had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment, yet it was also held that the Federal courts had no means to compel the Governor to perform the moral obligation of the State under the compact in the Constitution, and that the courts could not coerce the State Executive or other State officer as such to perform any duty by act of Congress. On that ground the motion for a *mandamus* to compel the Governor of Ohio to issue his warrant was refused. Nothing in that case can be regarded as any authority for the proposition contended for here. The case assumed the presence of the party in the State at the time of the alleged commission of the crime. The question was whether upon such assumption the Executive of the State upon whom the demand was made could examine as to the character of the crime and refuse to deliver up, in his discretion.

To the same effect is *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148. In that case the objection was made in the court of original jurisdiction that there could be no valid requisition based upon an indictment for an offense less than a felony. It was held that such view was erroneous, and *Kentucky v. Dennison*, 24 How. 66, 16 L. ed. 717, was cited in support of that proposition, yet it was in this very case of *Reggel* that the remarks already quoted were made, that the person demanded was entitled to insist upon proof that he was within the demanding State at the time he is charged to have committed the crime, and subsequently withdrew therefrom to another jurisdiction, so that he could not be reached by the criminal process of the State where the act was committed.

Many State courts before whom the question has come have held that a merely constructive presence in the demanding State at the time of the alleged commission of the offense was not sufficient to render the person a fugitive from justice; that he

must have been personally present within the State at the time of the alleged commission of the act, or else he could not be regarded as a fugitive from justice. Spear and also Moore on Extradition are to the same effect. Those authorities and text-writers are referred to in the margin.\*

In the case of *In re White*, 55 Fed. Rep. 54, 58, in the United States Circuit Court of Appeals for the Second District, it was said by Lacombe, circuit judge, that it was proper to inquire upon *habeas corpus* whether the prisoner was in fact within the demanding State when the alleged crime was committed, for if he were not it could not be properly held he had fled from it.

The subsequent presence for one day (under the circumstances stated above) of the relator in the State of Tennessee, eight days after the alleged commission of the act, did not, when he left the State, render him a fugitive from justice within the meaning of the statute. There is no evidence of claim that he then committed any act which brought him within the criminal law of the State of Tennessee, or that he was indicted for any act *then* committed. The proof is uncontradicted that he went there on business, transacted it and came away. The complaint was not made nor the indictments found until months after that time. His departure from the State after the conclusion of his business cannot be regarded as a fleeing from justice within the meaning of the statute. He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight.

We are of opinion that as the relator showed without contradiction and upon conceded facts that he was not within the State of Tennessee at the times stated in the indictments found in the Tennessee court, nor at any time when the acts were, if

\*Marginal citations referred to in the opinion:

*Wilcox v. Nolze* (1878), 34 Ohio St. 520, 524; *Jones v. Leonard* (1878), 50 Iowa, 106, 32 Am. Rep. 116; *Re Mohr* (1883), 73 Ala. 503, 514; *Re Fetter* (1852), 23 N. J. L. 311, 57 Am. Dec. 382; *Hartman v. Aveline* (1878), 63 Ind. 345, 30 Am. Rep. 217; *Ex parte Knowles* (1894), 16 Ky. L. Rep. 263; *Kingsbury's Case* (1870), 106 Mass. 223, 227; *State v. Hall* (1894), 115 N. C. 811, 28 L. R. A. 289, 20 S. E. Rep. 729; 2 Moore, Extradition, §§ 579, 581, 584; Spear, Extradition, 310 *et seq.*; Cooley, Const. Lim. (4th ed.) 21, note 1; 3 Crim. Law Mag. 806 *et seq.*, published 1882.

ever committed, he was not a fugitive from justice within the meaning of the Federal statute upon that subject, and upon these facts the warrant of the Governor of the State of New York was improperly issued, and the judgment of the Court of Appeals of the State of New York discharging the relator from imprisonment by reason of such warrant must be affirmed

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ARMSTRONG v. VAN DE VANTER.

21 Wash. 682—59 Pac. Rep. 510.

Decided December 23, 1899.

**EXTRADITION:**\* *Habeas corpus—Power of court to inquire into the extradition proceedings—Insufficiency of the indictment—Criminal complaints.*

1. An extradition requisition attested by the Lieutenant Governor of the State of Illinois, while acting Governor, bears on its face that the act is done by the executive authority of the State, as required by the Revised Statutes of the United States, section 5278, when it appears from the Constitution of Illinois that the Lieutenant Governor of that State is entitled to perform the Governor's duties in case of the absence or disability of that officer.
2. Upon an application for *habeas corpus* to obtain a discharge from arrest upon a warrant issued in extradition proceedings, the courts are authorized to inquire into the sufficiency of the indictment found in the demanding State, upon which the executive authority of that State has based his requisition.
3. Where an affidavit made before a justice of the peace charges that defendant "did unlawfully attempt to influence the decision of your affiant, who was serving at that time as a juror in a matter pending in court," etc., there is no crime charged under a statute which provides that "whoever corrupts or attempts, directly or indirectly, to corrupt any . . . juror . . . by giving, offering, or promising any gift or gratuity whatever, with intent to bias the opinion or influence the decision of such . . . juror . . . in relation to any matter pending in the court," is guilty of bribery, for which he may be punished by fine or imprisonment.
4. An indictment charging defendant with conspiring with another to induce a witness in a pending prosecution before a justice of the peace to leave the State, does not charge a crime, when it appears from the complaint set out in the indictment that the justice was without jurisdiction to try the party charged before him because he was not charged with any crime under the statutes.
5. Affidavits, which have not been incorporated in the statement of facts, will not be considered on appeal.

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\*See EXTRADITION in Table of Topics.



Appeal from the Superior Court of King County; Hon. Orange Jacobs, Judge. Reversed.

*Piles, Donworth & Howe*, for the appellant.

*James F. McElroy, John B. Hart, and Addison W. Hastie*, for the respondents.

DUNBAR, J. In August, 1899, the appellant being restrained of his liberty in King County, Wash., by the sheriff of said county and one Frank Tyrell, claiming to act as agent of the State of Illinois, filed his petition in the Superior Court praying for the issuance of a writ of *habeas corpus*. The writ was issued, but, after a hearing before the Superior Court, the petitioner was ordered remanded, and the proceedings dismissed. From this judgment the petitioner has appealed.

The facts preceding the arrest of the petitioner are as follows: On the 18th day of May, 1899, an alleged complaint was filed before a justice of the peace in the city of Chicago, of which the following is a copy:

"State of Illinois, County of Cook, City of Chicago—ss.: The complaint and information of J. S. Taylor, of Chicago, in said county, made before James C. Martin, Esquire, one of the justices of the peace in and for said county, on the 18th day of May, 1899. Said complainant, being first duly sworn, upon his oath says that on or about the 14th day of May, A. D. 1899, in county and State aforesaid, a person about five feet ten inches tall, medium complexion, whose Christian and surname is unknown to affiant, but whose person is well known, and who will be pointed out by affiant to the officer executing the warrant, did unlawfully attempt to influence the decision of your affiant, who was serving at that time as a juror in a matter pending in court; contrary to the form of the statute in such case made and provided. That this complainant has just and reasonable grounds to believe, and does believe, that said described person committed said offense, and therefore prays that he may be arrested, and dealt with according to law. [Signed] John F. Taylor.

"Subscribed and sworn to before me this 18th day of May, A. D. 1899. James C. Martin, Justice of the Peace. [Seal.]"



The warrant was issued upon this complaint, which was never served, nor were any subsequent proceedings had before said justice of the peace on said complaint or warrant. At the June term, 1899, of the Criminal Court of Cook County an indictment was found against the appellant and Daniel Coughlin, the latter of whom it is conceded was the person attempted to be described in the complaint above referred to. It is unnecessary, in consideration of our view of the case, to set this indictment out in full, but in substance it charged the said Coughlin and Armstrong with unlawfully, feloniously, fraudulently, maliciously, wrongfully, and wickedly conspiring together with a fraudulent and malicious intent to wrongfully and wickedly do an illegal act injurious to the administration of public justice, viz., to hire a certain witness, to wit, John F. Taylor, then and there a witness in a certain criminal cause wherein the People of the State of Illinois were complainants, upon the complaint and information of the said John F. Taylor, to leave the State of Illinois, so that he, the said Taylor, could not then and there be produced as a witness at the examination of said defendant. Embodied in and made a part of the information is the complaint originally made by Taylor before Justice of the Peace Martin. Upon this indictment a requisition was issued by the acting Governor of the State of Illinois on the Governor of the State of Washington for the arrest of the said William Armstrong. The Governor of the State of Washington honored the requisition, the arrest was made, and the appellant turned over to the custody of Tyrell, the agent of the State of Illinois. Upon the issuance of the writ, respondent sheriff, in his return, set forth copies of all the requisition papers filed with the Governor of Washington, as well as the warrant of the latter governor. The petitioner, replying to the return, pleaded, among other things, the statute law of the State of Illinois, and controverted the recitals contained in the warrant of the Governor of the State of Washington regarding the requisition papers on which said warrant purports to be based, claiming that his confinement, restraint, and imprisonment are in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, in that he is deprived of his liberty without due process of law, that he is denied the equal

protection of the laws within the State of Washington, and that his arrest and restraint are in violation of section 2 of article 4 of the Constitution of the United States, and of sections 5278 and 5279 of the Revised Statutes of the United States.

The affidavit of John R. Tanner, not having been incorporated in the statements of facts, under the uniform decisions of this court cannot be considered.

The first assignment of error is that the court erred in holding that the executive authority of Illinois has demanded such petitioner, as a fugitive from justice, of the Executive of the State of Washington, for the reason that it does not appear by the requisition papers that W. A. Northcott, the person making the demand, is, or was at the time of making the same, the executive authority of the State of Illinois. We think it sufficiently appears from the record, in consideration of the Constitution and laws of Illinois, that the extradition requisition was sufficiently attested by the executive authority of Illinois.

The second and third assignments of error embrace, in substance, the abjection urged in the first.

The fourth assignment is that the court erred in refusing to go into the question of the sufficiency of the purported indictment included in the requisition papers and in refusing to decide whether said purported indictment charges a crime against said petitioner. On this proposition, after a somewhat extended, and also somewhat unsatisfactory, examination of the authorities cited, we are forced to the conclusion that the Superior Court should have entered upon the investigation of this question. So far as we have been able to determine, this question has not been squarely passed upon by the Supreme Court of the United States; certainly not in any of the cases cited. In *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250, the court approached this question with the following suggestion: "In connection with this proposition, counsel discusses, in the light of the adjudged cases, the general question as to the authority of a court of the State or Territory in which the fugitive is found to discharge him from arrest whenever, in its judgment, the indictment, according to the technical rules of original pleading, is defective in its statement of the crime charged. It is sufficient, for the purposes of the present case,

to say that by the laws of Pennsylvania every indictment is to be deemed and adjudged sufficient and good in law which charges the crime substantially in the language of the act of assembly prohibiting its commission, and prescribing the punishment therefor, or, if at common law, so plainly that the nature of the offense charged may be easily understood by the jury; and that the indictment which accompanied the requisition of the Governor of Pennsylvania does charge the crime substantially in the language of her statute." It is claimed in this case that there is no crime charged, substantially or otherwise, under the laws of the State of Illinois; so that no light can be obtained from the case cited. In *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544, after referring to section 5278 of the Revised Statutes, the court says: "It must appear, therefore, to the Governor of the State to whom such a demand is presented, before he can lawfully comply with it: First, that the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled, by an indictment or affidavit, certified and authentic, by the Governor of the State making the demand; and, second, that the person demanded is a fugitive from justice of the State the executive authority of which makes the demand. The first of these prerequisites is a question of law, and is always open, upon the face of the papers, to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. The second is a question of fact which the Governor of the State from whom the demand is made must decide upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are questions not settled by harmonious judicial decision, or by any authoritative judgment of this court." It is a little difficult to understand to what the last sentence in this quotation refers, whether to the first or second question discussed. But, in any event, the announcement is that, before the requisition can issue, the person demanded must be substantially charged with a crime against the laws of the State from which he has fled. But the matter actually decided by the court is found from the further expression to this effect: "It is conceded that the determination of the fact by the

Executive of the State in issuing his warrant of arrest upon a demand on him, made on the ground whether the writ contains a recital of an expression finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof. Further than that it is not necessary to go in the present case"—citing *Ex parte Reggel, supra*. And it is further decided that the particular indictment under question must charge a crime under and against the laws of the demanding State. In *Pearce v. Texas*, 155 U. S. 311, 15 Sup. Ct. 116, 39 L. Ed. 164, it can be gathered from the *syllabus* that the question of the sufficiency of the indictment should be left entirely to the demanding State, but the opinion itself will not bear out this proposition. It goes to the extent of holding that, where the indictment is in substantial conformity with the statute of the demanding State, the defendant shall not be discharged. It is true that a majority of the judges of the Circuit Court went further in this direction than did the opinion written by Simpkins, J., but Chief Justice Fuller, in a very brief opinion, after reciting the opinion of the lower court, concludes as follows: "The question resolved itself, therefore, into one of the validity of the statute on the ground of its repugnancy to the Constitution, and the Court of Appeals declined to decide in favor of its validity.

. . . What the State court did was to leave the question as to whether the statute was in violation of the Constitution of the United States, and the indictments insufficient accordingly, to the demanding State. Its action in that regard simply remitted to the courts of Alabama the duty of protecting the accused in the enjoyment of his constitutional rights, and, if any of these rights should be denied him—which is not to be presumed—he could then seek his remedy in this court." This case is referred to in *Whitten v. Tomlinson*, 160 U. S. 231, 16 Sup. Ct. 297, 40 L. Ed. 406, in which the question was presented whether, in a case where the court in which the indictment was found had jurisdiction of the offense, it was sufficient to make it the duty of the courts of the United States to decline interposition by writ of *habeas corpus*, and it was held that under such circumstances the courts of the United States would leave the question of the lawfulness of the detention of the

prisoner to be inquired into and determined in the first instance by the courts of the State. This case, like the other United States cases on this subject, is not very clear on the proposition involved here, but there is no distinction announced between the powers of the demanding and the fugitive States in this respect.

We have not overlooked the citation of 2 Moore, Extrad., 638, which is to the effect that ". . . it is believed that there is no case in which a court has, on *habeas corpus*, discharged a fugitive from custody on a rendition warrant on the ground that an indictment accompanying the requisition did not constitute or contain a sufficient charge of crime." The author, however, certainly did not intend this to be an unequivocal announcement of the law, but evidently had reference to some distinction between the examination of an indictment and that of an affidavit, for the cases which he cites in support of the text, viz., *People v. Brady*, 56 N. Y. 182, and *People v. Donohue*, 84 N. Y. 438, clearly announce the other doctrine; for while it was held in *People v. Donohue*, *supra*, that, where the papers upon which a warrant of extradition was issued were withheld by the Executive, the warrant itself could only be looked to for the evidence that the essential conditions of its issue have been complied with, the court, in passing upon the proposition under discussion here, said: "And hence we have held that, where the preliminary papers upon which a warrant of extradition has been granted are produced, and are before us, it is our right and our duty to examine them, and judge and determine, when our process is invoked, whether they are sufficient, under the law, to justify the warrant of extradition."—citing *People v. Brady*, 56 N. Y. 182. And the court reaffirms that doctrine by saying: "Our ruling in this respect has not escaped criticism (*Leary's Case*, 6 Abb. N. C. 44), but an opposite conclusion, which would make the determination of the executive final, even though the papers produced clearly showed that the essential preliminaries of the law were unfulfilled, does not yet commend itself to our judgment." Church. Hab. Corp., § 480, in discussing this question, says: "The warrant of the Governor is *prima facie* evidence, at least, that all necessary legal prerequisites have been complied with; and, if the previ-

ous proceedings appear to be regular, such warrant is, as a general rule, conclusive evidence of the right to remove the prisoner to the State from which he fled"—reference being made, to sustain this proposition, to the cases cited by him to sustain the first proposition that the warrant is *prima facie* evidence of compliance with legal prerequisites. Upon examination it is found that these cases only sustain the first proposition. For instance, the first case cited—*Davis' Case*, 122 Mass. 324—seems, in the *syllabus*, to indicate that the regularity of the proceedings is conclusive evidence of the right to remove. But the opinion itself does not lay down such a rule, and the broad announcement in the *syllabus* is qualified by the announcement in the opinion of the requirement that a crime must substantially be charged. The court says: "When an indictment appears to have been returned by a grand jury, and is certified as authentic by the Governor of the other State, and substantially charges a crime, this court cannot, on *habeas corpus*, discharge the prisoner because of formal defects in the indictment, but the sufficiency of the charge as a matter of technical pleading is to be tried and determined in the State in which the indictment was found;" citing *In re Clark*, 9 Wend. 212. And, continuing, it is said: "And as this ground is conclusive against the petitioner, it is unnecessary to consider whether the warrant of the Governor of this Commonwealth, issued upon the judgment and certificate of the Governor of Vermont, would preclude the court from inquiring and determining whether the indictment was defective in substance." So that it seems that the very question at issue here was not passed upon in that case. Then the court proceeded to distinguish the cases of *People v. Brady*, *supra*, and *Ex parte Smith*, 3 McLean, 121, Fed. Cas. 12,968—both cases where no crime had been substantially charged—from the case then under consideration; and the other cases cited bear no more directly upon the question in point here than does the *Davis Case*, with the exception of the *Leary Case*, 6 Abb. N. C. 43. But it is easy to determine what the view of Church was on the subject, for, after the statements above referred to, he continues: "But after the Governor has issued his warrant, and the fugitive has been arrested by virtue of such warrant, it is competent for the courts



of either State, on *habeas corpus*, to look into the papers, and, if they show no legal cause of detention, to discharge the prisoner;" citing *In re Cook* (C. C.), 49 Fed. Rep. 833, and *People v. Brady*, 56 N. Y. 182, and many other cases.

But the fact that the United States Supreme Court has in many instances passed upon the sufficiency of indictments, although the question under discussion was not raised or decided, indicates the opinion of the Supreme Court of the United States on that proposition; for if it were held that the sufficiency of the indictment could not be inquired into, at least so far as determining whether or not a crime had been committed under the allegations of the indictment, the very questions passed upon by the Supreme Court of the United States would not have been essential questions. The question has been squarely decided by several of the State and Federal courts, notably in *People v. Brady*, 56 N. Y. 182, where the court expressed itself in the following terse and decisive language: "He is entitled, in common with all citizens, to such protection as the law gives to all; and, while the reversal of the proceedings may lead to the escape of an offender, we cannot close our eyes to the fact that criminal prosecutions for false pretenses are often perverted to the accomplishment of personal and private ends. It would be a dangerous precedent if it should be held that a man could be deprived of his liberty, and removed to another State, upon an accusation so vague and unsatisfactory as is contained in the affidavits in this case. It is a reasonable rule, supported by obvious considerations of justice and policy, that when a surrender is sought upon proof, by affidavit, of a crime, the offense should be distinctly and plainly charged. Security to personal liberty demands this, and the State will meet the full measure of its obligation under the Federal Constitution if it requires this before consenting to the arrest and removal of alleged offenders." It seems to us that the reasoning in this case is unanswerable, and, even if the authorities were conflicting, we should be inclined to follow it. Equally plain and convincing is the following language used by the court in *Re Terrell* (C. C.), 51 Fed. Rep. 213, to wit: "There is good cause for holding that this power should be exercised liberally whenever the judge before whom the questions are raised on application



for a warrant of removal or on *habeas corpus* is satisfied from the face of the indictment that, were such an indictment before him for trial, and demurred to, he would quash it. This is a country of vast extent, and it would be a grave abuse of the rights of the citizen if, when charged with alleged offenses, committed, perhaps, in some place he had never visited, he were removable to a district thousands of miles from his home, to answer an indictment fatally defective on any mere theory of a comity which would require the sufficiency of the indictment to be tested only in the particular court in which it is pending. Nor should the mere novelty of the points raised be held to preclude the court before which comes the question of removal from passing upon them, when it has no doubt as to how it would pass upon them if the cause were pending before it." To the same effect is *Ex parte Hart*, 11 C. C. A. 165, 63 Fed. Rep. 249. This is a case from this State where requisition was made on the Governor of Maryland. This case also disposes of the question of the sufficiency of the affidavit by a private individual. The court, in concluding its remarks, says: "The claim that the act of the Governor of a State in issuing his warrant of removal is conclusive, and that the presumption is he had the necessary papers, duly authenticated, before him, when he acted, cannot be assented to. The act of the Governor can be reviewed, and, if he has not followed the direction and observed the conditions of the Constitution and laws of the United States pertinent to such matters, can be set aside as void." It is evident that he has not followed the laws of the United States if the record does not show that the party demanded has committed a crime. In any event, the party demanded may be, and frequently is, a *bona fide* resident and citizen of the State upon which the requisition is made; and to hold that such party should be discriminated against in the administration of criminal law, and should be deprived of the rights and privileges under the law which are accorded to other citizens charged with crime, is not in keeping with the spirit of our law or the genius of our Government, and would unnecessarily tend to a subversion of personal liberty.

The conclusion reached that the court has a right to inquire into the sufficiency of the indictment brings us to the investiga-

tion of questions affecting the substance of the extradition proceedings and the validity of the complaint upon which the indictment was founded. The section of the Federal law on which the defendant in this case must be extradited, if at all, is as follows: "Sec. 5278. Whenever the executive authority of any State or Territory demands any person as a fugitive from justice of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or affidavit made before a magistrate of any State or Territory charging the person demanded with having committed treason, felony or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured and to cause notice of the arrest to be given to the executive authority making such demand or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear." This law was enacted by Congress to make operative section 2 of article 4 of the Constitution of the United States, which is as follows: "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on the demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." The basis of the right of extradition, it will be seen, is the allegation in the indictment or affidavit that a crime has been committed by the person sought to be indicted. A pertinent question, then, is, is the defendant here legally charged with the commission of a crime under the laws of the State of Illinois by the indictment which is made a part of the record? We think this question must be answered in the negative. The indictment is based upon a complaint made before Justice of the Peace Martin, by Taylor, and has been set forth above. It is earnestly contended by the appellant that the description is not sufficient; that "a person about five feet ten inches tall, medium complexion, whose Christian and surname is unknown to affiant, but whose person is well known, and who will be pointed out by the affiant to the officer execut-

ing the warrant," is not sufficiently definite, and that no particular person is therein described. Had the complaint, in other particulars, been sufficient, we are not certain that we should discharge the appellant on this defect alone, but in other respects no crime seems to have been charged. The person attempted to be described is charged with unlawfully attempting to influence the decision of affiant, who was serving at that time as a juror in a matter pending in court, contrary to the form of the statute in such cases made and provided. It appears from the record that no arrest had been made at the time the indictment which is based upon this complaint was founded, and it may have been, especially considering the meagerness of the description, that no arrest ever would be made, and that there could be no attempt to conspire for the purpose of hiring a witness to leave the State to evade testifying in the alleged proceeding. In addition to this, the defendant is not informed by the complaint what court it was in which the matter was pending—whether it was a court in Cook County or in the State of Illinois—and, indeed, for all the information that the complaint gives, it might have been a court anywhere in any of the States of the Union; and while, under the uniform practice, many of the refinements of the criminal law which tend to defeat the end of justice have been swept away, yet the other extreme must not be reached, of holding a defendant answerable to the law when he is not charged with any crime. In those jurisdictions where the reformed practice prevails, a statement of facts has been substituted for the technical requirements of the common law; but here there is no statement of facts to which the accused can turn to aid him in preparing his defense in the matters to which we have above referred.

The section of the Illinois statute upon which this complaint was based is as follows: "Whoever corrupts or attempts, directly or indirectly, to corrupt any master in chancery, auditor, juror, arbitrator, umpire, or referee, by giving, offering or promising any gift or gratuity whatever, with intent to bias the opinion or influence the decision of such master in chancery, auditor, juror, arbitrator, umpire or referee in relation to any matter pending in the court, . . . shall be imprisoned in the penitentiary not exceeding five years or fined not exceeding

one thousand dollars, and confined in the county jail not exceeding one year." 1 Starr & C. Ann. St., p. 764, § 33. It is true that a complaint made to a justice of the peace will not be scrutinized as critically as will an indictment by a grand jury, nor will it be required to follow as closely rules of technical pleading. But even a complaint made to a justice of the peace, to give the justice jurisdiction, must state the facts which, under the law, constitute a crime. Under the statute above cited it is not a crime to unlawfully attempt to influence the decision of a juror in a matter pending in court, but the crime is to attempt to corrupt, not by unlawfully influencing, but by unlawfully influencing how? The statute is not silent as to the mode. Many willful attempts to corrupt and influence the decision of a juror might be conceived of that would not fall under the ban of this statute, and there might be many unlawful attempts to influence a juror without any attempt whatever to corrupt. For instance, talking before a juror about the merits of a case for the purpose of influencing him. Such an act would be unlawful, and doubtless would subject the offender to punishment for contempt; or an attorney might deliberately misstate the evidence in the case; and instances of this character of offenses might be multiplied. But certainly such would not be crimes falling within the purview of this statute; and yet, as far as this complaint informs us, the defendant might have been charged with one of the offenses instanced. But the statute leaves nothing to conjecture, or to the discretion of the court, for it plainly provides that the attempt to corrupt and unlawfully influence must be by giving, offering, or promising some gift or gratuity. Through these agencies alone must the corrupting influence be obtained or attempted. It is also contended by the respondent that under the law of Illinois it is sufficient to charge the crime in the language of the statute. However that may be, a glance at the law and the complaint shows that the offense was not charged in the language of the statute.

It is insisted by the respondent that the pleading of the complaint in this instance was a matter of inducement, and that in such cases that particularity is not required that is required in charging the crime to which the respondent is

to answer; and many citations are made in support of that proposition, notably 2 Bish. New Cr. Proc. 904, where the rule is announced as follows: "The following distinction, if borne in mind, will be helpful to a proper understanding if this entire subject: The averments are necessarily and always of two classes—those which disclose a foundation for the commission of the offense and those which charge the offense itself. By the universal rules of criminal pleading, the former, commonly called 'inducement,' may be general in terms, and be either introduced, or not, by 'whereas.' The latter must be full, direct, and specific"—and the cases cited are to the same effect. But the trouble with this particular case is that, while the indictment might have been held sufficient if a general reference had been made to the matter which is pleaded by way of inducement, the pleader did not see fit to do this, but pleaded in full the complaint upon which the indictment is based; and, the complaint showing affirmatively that there was no jurisdiction in the justice of the peace to issue the warrant for the arrest of the defendant, there could have been no trial pending to base the indictment upon which is presented against the defendant in this case. The whole record, then, affirmatively showing lack of jurisdiction in the justice of the peace to try the original case, the indictment must be held to be illegal and void, as the defendant is not charged with any crime. It is not crime to attempt to induce a person to leave the State. It is a crime only when such attempt is made for the purpose of injuriously affecting the administration of public justice in a cause pending. The judgment will be reversed, with instructions to the lower court to discharge the defendant.

GORDON, C. J., and REAVIS and FULLERTON, JJ., concur.

NOTES (by J. F. G.).—In the opinion it is said that the "requisition was issued by the *acting* Governor of the State of Illinois," which the court holds to be a compliance with the Constitution of the State of Illinois. The Constitution in that respect provides as follows:

"In case of the death, conviction or impeachment, failure to qualify, resignation, absence from the State, or other disability of the Governor, the powers, duties and emoluments of the office, for the residue of the term, or until his disability should be removed, shall devolve upon the Lieutenant Governor."

Another provision of the Constitution provides that if both the Governor and Lieutenant Governor are disqualified, that the President *pro tempore* of the Senate, shall act; and in case of the inability of all three that the duties of the office shall devolve upon the Speaker of the House of Representatives. It may be seriously doubted whether the authorities cited support the conclusion; for unless otherwise shown, the Governor is presumed to be within the State attending to his duties as *sole* executive of the State. Early in 1893, one Ed. Relly, being arrested in Chicago upon a fugitive warrant, applied for a writ of *habeas corpus*; but before the case was disposed of, an extradition warrant, signed by the Lieutenant Governor, with the certificate of the Secretary of State, stating, "by the order of the Acting Governor" was produced in court, which Judge Dunne, then presiding, held to be void; for the reason, that the presumption of the Governor's presence within the State, and of his ability to act, could only be overcome by a certificate stating a fact, which would show absence or disability. This case, although at the time attracting considerable attention, is not reported in any law publication; but the writer speaks from personal knowledge, having been counsel for the prisoner at the hearing of the case.

*Defective Criminal Complaint.*—The point made in the opinion, that Justice Martin had no jurisdiction, because the criminal complaint was fatally defective, is well sustained by authorities. This subject has been given considerable attention in the eleventh volume of these reports; in which see pages 298, 349, 355, 356, 369, 380, 382, 384 and 385; also see *Rice v. Ames*, in the present volume, and *State v. McGahey*, 97 N. W. Rep. 865. The last-mentioned case will appear in a later volume of these reports.

*John Doe Warrants.*—The proceedings before Justice Martin were void for another reason, which the court declined to pass upon. The complaint did not give the name of the accused; nor did it give such a description as would enable the justice by his warrant to order the arrest of a particular person; and was therefore in direct violation of section 6, article 2, of the Constitution of Illinois, which requires a particular description of the accused to appear by affidavit. The frequency of such irregular proceedings, prompted the writer to review the matter in an article, which appeared in the Chicago Law Bulletin, October 1, 1902, and Chicago Legal News, October 4, 1902 (35 Chi. L. N. 54). Inserting several bracket citations we give the article below:

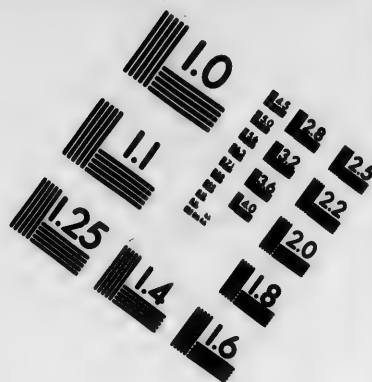
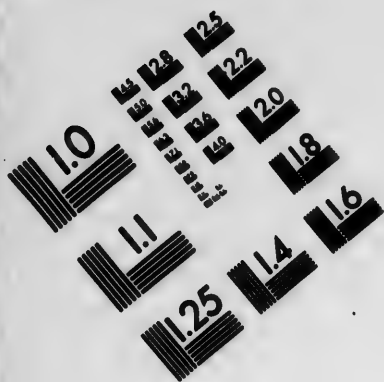
#### "JOHN DOE WARRANTS."

By John F. Geeting.

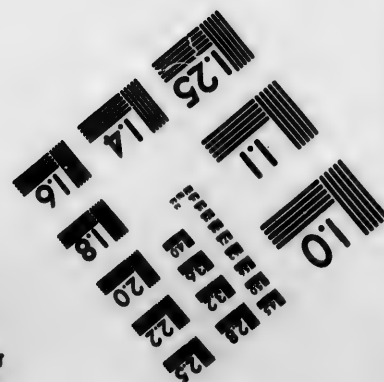
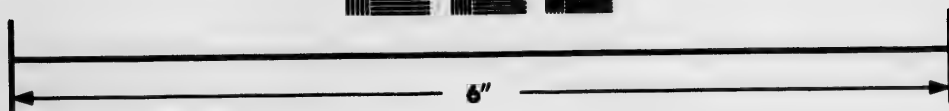
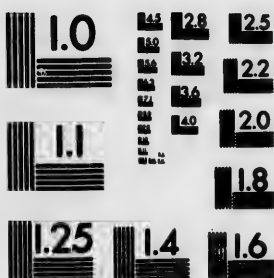
Individual freedom from physical restraint is a cherished and favored ideal of both American and English jurisprudence. A right not to be abridged, except for good and specific cause, and then only by procedure recognized by law.

In cases of emergency, such restraint may be had without written judicial process; but this power should only be exercised, when public or individual safety require immediate and effective action. (*Sarah Way's Case*, 41 Mich. 299.)





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A judicial warrant issued for the arrest of a human being should not only be based upon evidence presented to a magistrate, but the cause for the arrest must in some manner appear in the warrant; so that the officer by his warrant is informed of the right to make the arrest, and the person to be arrested may thereby be informed that the warrant has been issued for good cause shown and for *his* arrest.

The warrant being issued on evidence presented to the magistrate, and by him passed upon, can only operate against the individual or individuals against whom in his opinion sufficient cause for arrest has thereby been shown, leaving no discretion to the officer executing the warrant, as to the person or persons to be arrested; consequently the warrant should describe the accused with that degree of accuracy, that from the description alone the officer may know whom to arrest.

Generally the accused is described by his known name, but if his name be not known to the magistrate, some other description should be given by which he can be identified. As to the sufficiency of such description the Supreme Court of Maine held the following to be insufficient: "A person whose name is unknown but whose person is well known of the vassalboro, in the county of Kennebec," the court saying: "The omission of the name, as a means of identification is justified only on grounds of necessity; and when this is not known the warrant must indicate on whom it is to be served in some other way, by a specification of his personal appearance, his occupation, his precise place of residence or of labor, his recent history, or some facts which give a special designation that the Constitution requires." (*Harwood v. Siphers*, 70 Me. 464. See, also, *Chitty Crim. Law* (5th Am. ed.) 39; 1 Hale, P. C. 527; *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200.)

The doctrine that only the person described can be arrested seems of universal application wherever the common law prevails; and in some of the American States it is accentuated by either constitutional or statutory provision.

In England where a warrant directing the arrest of Josiah Shadgett was served on John Shadgett, *who it seems was the person intended*, Lord Ellenborough held: That trespass could be maintained, saying: "Process ought regularly to describe the party against whom it is meant to be issued, and the arrest of one person cannot be justified under a writ sued out against another." (*Shadgett v. Clipson*, 8 East, 328. See, also, *Wilkes v. Lorck*, 2 Taunt. 400.)

In New York a warrant directed the officer to "take the body of John Doe, the person carrying off the cannon;" the warrant being intended for Levi Mead, who, when arrested, was leading a horse attached to the cannon wagon. *Held*, that trespass would lie for false arrest. (*Mead v. Haws*, 7 Cowen, 332.) So in the same State a warrant was issued for John Doe and Richard Roe, and was served upon Samuel W. Lovell, *one of the persons for whom it was intended*, and who was tried and convicted; it was held that he could maintain an action for false imprisonment. (*Gurnsey v. Lovell*, 9 Wend. 319. See, also, *Scott v. Ely*, 4 Wend. 555; *Griswold v. Sedgwick*, 6 Cowen, 456.)

In New Hampshire a writ directing the arrest of George Melvil was served upon George Melvin. Melvin brought suit for false imprison-

ment and obtained a verdict. In sustaining the verdict the court said: "It is well settled that he who causes another to be arrested by a wrong name, is a trespasser, even if the process was intended to be against the person actually arrested." (*Melvin v. Fisher*, 8 N. H. 406. See, also, *Miller v. Foley*, 28 Barb. (N. Y.) 630; *Hoye v. Bush*, 1 M. & G. 775, 39 E. C. L. 649.)

In Massachusetts a complaint was filed charging that "John Doe or Richard Roe whose other or true name is to your complainant unknown" had committed assault and battery; upon which a warrant to the same effect issued, and an effort being made to arrest Morris Crotty, for whom the warrant was actually intended. Crotty and his friends made a vigorous resistance, for which they were indicted for riot; but the Supreme Court held that the resistance was lawful in that the warrant should have given the best possible description of the person to be arrested. (*Commonwealth v. Crotty*, 10 Allen, 403, 87 Am. Dec. 669.)

A United States Commissioner having issued a warrant directing the arrest of James West, really intending it for Vandy West, who was arrested by it. Suit was brought for false imprisonment. The Supreme Court of the United States held that as he had never been known by the name of James West, he could maintain his action. (*West v. Cabell*, 153 U. S. 78.)

The practice of issuing John Doe warrants is very common in the city of Chicago, some of the justices thinking that they improve the form of a warrant by inserting the words "to be pointed out;" but which adds nothing to the strength of the warrant in that it is an attempt of the justice to transfer his judicial function to some private individual.

The application of this doctrine to the courts of Illinois is settled beyond doubt by section 6, of the Bill of Rights, which reads as follows:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized."

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### IN RE WALKER.

61 Neb. 803—86 N. W. Rep. 510.

Decided May 22, 1901.

EXTRADITION:\* *Habeas corpus*—Liability of person extradited from another State to civil process—Bastardy—Jurisdiction—Practice.

1. A prisoner held under a process in due form issued upon a judgment cannot obtain his discharge by *habeas corpus* unless the judgment is void, and not merely voidable.

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\*See EXTRADITION in Table of Topics.

2. A suit against the putative father for the maintenance of his illegitimate child is essentially a civil action, accompanied by the extraordinary remedy of arrest and imprisonment for the purpose of enforcing a judgment rendered in the case.
3. The bastardy act is an exercise of the police power of the State, the object of which is to require the putative father, in compliance with his moral obligation, to furnish support for his child, and indemnify the public against liability for its care and maintenance.
4. A justice of the peace obtains jurisdiction over a defendant, under the act in question, by the filing of the statutory complaint, duly verified, the issuance of a warrant for the arrest of the defendant, and its execution; the execution of the process serving the same office as the service of a summons in an ordinary civil action.
5. In a proceeding under the bastardy act, the District Court acquires jurisdiction by the filing of the transcript of the proceedings had before the justice of the peace, based on a proper complaint, arrest of the accused, and an order requiring him to appear before the District Court for trial. *Altischuler v. Algaza*, 21 N. W. Rep. 401, 16 Neb. 631.
6. The District Court, having acquired jurisdiction by the filing of a transcription of the proceedings had before a justice of the peace, is empowered to try the case and render judgment, even though the defendant be not personally present.
7. Where a defendant fails to appear in the District Court in pursuance to an order made at the preliminary inquiry had before a justice of the peace, and enters no plea to the complaint, a trial may be had to the court without the aid of a jury provided for by section 3, chapter 37, Comp. St. 1899, to try the issue on a plea of not guilty.
8. The failure to impanel a jury to try the issue would not go to the jurisdiction of the court, but, at most, render the judgment erroneous, the correction of which could not be had by proceedings in *habeas corpus*.
9. A defendant brought to this State on requisition in good faith, and not as a pretext or device to serve some ulterior purpose, may be prosecuted on any other charge of violating the laws of the State, or for a civil liability or obligation resting upon him, and is not exempt from service of process until a reasonable time elapses in which to return to the State from which he was brought under the requisition.
10. A defendant brought into the jurisdiction of the courts of this State on requisition from another State is not entitled to immunity from service of process, civil or criminal, until a reasonable time elapses in which to withdraw from the jurisdiction, such as is ordinarily extended to suitors and witnesses whose attendance at court is voluntary.

(Syllabus by the Court.)

In the Matter of the Application of John Walker for his discharge from imprisonment, by a writ of *habeas corpus*. Denied.

*Matthew Gering*, for the plaintiff.

*Jesse L. Root, C. S. Polk, and C. F. Tafft*, for the defendant.

HOLCOMB, J. The petitioner, John Walker, brings an original action in this court for a writ of *habeas corpus*, alleging in his petition that he is unlawfully restrained of his liberty by the sheriff of Cass County, in whose custody he is held by virtue of a *capias* writ issued out of the District Court of said county. It appears from the record that the writ was issued on a judgment of filiation rendered in an action pending in said court against the petitioner, in which said judgment it was ordered by the court that the defendant (the petitioner) pay the plaintiff in the action the sum of \$138.75 for the care and expense connected with the birth, care, and death of a bastard child (he being adjudged to be the reputed father), and the costs of the action, in default of which payment, or the securing of the payment thereof, the defendant should be committed to the jail of the county until the judgment be complied with. The facts in the case are stipulated by the parties. There are but two questions of controlling importance necessary to be considered in a proper determination of the controversy, which will appear in the further discussion of the subject. In September, 1900, a complaint was entered by Lillie Parker, an unmarried woman, before a justice of the peace of Cass County, under the provisions of chapter 37 of the Compiled Statutes of 1899, charging the defendant with being the father of her illegitimate child, of which she had been delivered a short time previous. A warrant was issued, and the defendant arrested and brought before the justice; and upon defendant's application a continuance of the hearing contemplated by the statute was had, and he entered into a recognizance to appear at the time to which the hearing was continued. Upon a hearing had before the justice of the peace as to the truth of the charge made against the defendant, at which he was present, evidence was submitted and reduced to writing as required by statute, upon considera-

tion of which it was found that the complaint was established; and the defendant was required to enter into a recognizance in the sum of \$500 for his appearance at the next term of the District Court to answer the accusation made against him and abide the order of the court. The defendant was placed in the custody of a constable for the purpose of securing the recognizance required, and, neglecting to give the same, a *mittimus* was issued, authorizing his commitment to the jail of the county. Before execution of the *mittimus* the defendant escaped from the custody of the constable, and fled to the State of Iowa. A transcript of the complaint and all proceedings had before the justice of the peace was duly made, certified, and filed in the office of the Clerk of the District Court of Cass County on the first day of the next term thereof held after the preliminary hearing had before the justice of the peace. The defendant failing to appear at said term of the District Court, his default was duly taken and entered, and, the case coming on for hearing, evidence was submitted to the court without the intervention of a jury, upon consideration whereof it was by the court adjudged that the defendant was the reputed father of the bastard child of the plaintiff, and liable for its support and maintenance, and awarding judgment accordingly as herein first mentioned. The defendant was afterwards arrested on a *capias* issued upon the judgment, and held in custody, because of his failure and default in complying with the judgment so rendered.

It is contended by counsel for the petitioner, and argued in his brief, that the judgment which is the foundation for the process directing the arrest and imprisonment of the defendant is void for want of jurisdiction over his person of the court rendering the judgment; the precise claim being that because the defendant was not personally present in court and had entered into no recognizance for his presence thereat, having fled from the custody of the officer detaining him under the *mittimus*, jurisdiction by the District Court was never acquired over his person. We are therefore to inquire, in what manner does the District Court obtain jurisdiction in a proceeding of the character under consideration? Is it by filing a transcript of the complaint and proceedings had before a justice of the peace—who,

it must be conceded, in this case was empowered to act, and had the jurisdiction which was exercised at the preliminary inquiry—or must the personal presence of the defendant, voluntarily or involuntarily, be had in the District Court before it is authorized to render judgment in the case?

Preliminary to what follows, we, perhaps, should here note that *habeas corpus* proceedings cannot be resorted to for the purpose of correcting errors of the trial court rendering the judgment which is challenged in such proceedings. If the prisoner is held under a process in due form issued upon a judgment, he cannot obtain his discharge by *habeas corpus* unless the judgment is void, and not merely voidable. *Freem. Judgm.*, § 619, citing *Ex parte Marx*, 86 Va. 40, 9 S. E. Rep. 475; *In re Coy*, 127 U. S. 731-757, 8 Sup. Ct. 1263, 32 L. Ed. 274; *Ex parte Watkins*, 3 Pet. 191-202, 7 L. Ed. 650. The bastardy proceedings must also be regarded as essentially a civil action, accompanied by the extraordinary remedy of arrest and imprisonment for the purpose of enforcing a judgment rendered in the case. *Ex parte Cottrel*, 13 Neb. 193, 13 N. W. Rep. 174; *Altschuler v. Algaza*, 16 Neb. 631, 21 N. W. Rep. 401; *Strickler v. Grass*, 32 Neb. 811, 49 N. W. Rep. 804. While in its character the proceeding is a civil action under the statute, the act is, properly speaking, the exercise of the police power of the State, the object of which is to require the putative father, in compliance with his moral obligation to furnish support for his child, and indemnify the public against liability for its care and keeping; "to compel him to assist in the maintenance of the fruit of his immoral act," and to prevent the child from becoming a county charge. *Stoppert v. Nierle*, 45 Neb. 105-117, 63 N. W. Rep. 382, and cases therein cited.

It is practically conceded that the justice of the peace before whom the preliminary proceedings were had in the case had jurisdiction and authority to act regarding the case, in so far as his powers were exercised. This jurisdiction was obtained by the filing of the statutory complaint, duly verified, and the issuance of a warrant thereon, and the arrest of the defendant. The process by which the court acquired jurisdiction over the defendant was the warrant issued for his arrest, and its execution serves the same office as the service of a summons in an ordi-



nary civil action, and the court thereby acquired jurisdiction over the person of the defendant. *Altschuler v. Algaza, supra; Beckett v. State* (Ind.), 30 N. E. Rep. 536. The justice cannot try the case. He may make only an examination, and, if the evidence warrants it, require the defendant to enter into a recognizance to appear at the next term of the District Court, there to answer the complaint and abide by the order of the court. This proceeding, however, is required only in the event of the defendant's failure to comply with the provisions of section 1 of said chapter 37 for the payment of money or transfer of property to the plaintiff, and to give an obligation to save the county free from charge towards the maintenance of the child. If the defendant comply with these provisions, he is entitled to be discharged. On the District Court the statute has conferred original jurisdiction to try the case on its merits, and render judgment of affiliation and for the maintenance of the illegitimate child, in such sum as may be ordered. *Munro v. Callahan*, 41 Neb. 849, 60 N. W. Rep. 97.

Has the District Court jurisdiction for this purpose when a defendant has not personally appeared therein, under the facts and circumstances as in the case at bar? In *Altschuler v. Algaza, supra*, it is held in the *syllabus* that: "In a proceeding under the Bastardy Act, the District Court acquires jurisdiction by the filing of the transcript of the proceedings before the justice, based on a proper complaint, arrest of the accused, and order requiring him to appear before the District Court for trial." The record in this case discloses that a transcript of all the proceedings had before the justice of the peace was duly filed in the office of the clerk of the District Court; and jurisdiction, it would seem, was by the court thus acquired as fully as if the defendant had voluntarily submitted his person to the jurisdiction of that court, and afterwards departed without leave. The court having secured jurisdiction by the filing of the transcript, the vital question next presented is whether the court has jurisdiction to render judgment in the absence of the defendant.

Jurisdiction having been acquired at the commencement of the action, and the case after the examination contemplated by the statute before the justice, having been transferred to the District Court for the continuation of the proceeding, we ob-

serve no good reason for holding that the case may not be proceeded with, and a proper judgment rendered, of the same validity and force, and to the same extent, as though such proceeding were in the first place had in the District Court. The action being civil in character, there would seem to be no pressing necessity for the defendant's presence if he voluntarily absents himself from the court at the time of the hearing had in that tribunal. The court has jurisdiction over the person of the defendant and the subject-matter, by filing of the transcript, and, as we view the entire scope and object of the statute, is empowered to try the case and render judgment even though the defendant be not personally present. The object of the statute providing for the detention of the defendant in confinement, or his recognizance for his appearance in the District Court, is manifestly for the purpose of enforcing summarily the judgment rendered in the action, and not to confer jurisdiction on the court. This had already been accomplished in the manner stated. It is observed by Bellows, J., in a well-considered case (*Stokes v. Sanborn*, 45 N. H. 276): "Indeed, it is quite obvious that the object of the law is to redress a civil injury, by compelling the putative father to aid the mother in the support of the child, and to indemnify the town chargeable with its support against the expenses which may be incurred thereby; giving to the court the power to require of the father or the mother, or both, security against this liability. . . . Some of the forms of this proceeding, it is true, are borrowed from the criminal law; but these are simply with the view of giving a more summary and stringent character to the process by which the respondent is brought into court and held to answer the charge, leaving it in most other respects to stand upon the footing of ordinary civil causes. It is therefore held in *Marston v. Jenness*, 11 N. H. 156, and *Little v. Dickinson*, 29 N. H. 56, that the respondent is not arraigned, but appears and pleads by attorney. Under a similar law in Massachusetts this is held to be a civil proceeding. *Wilbur v. Crane*, 13 Pick. 284; *Williams v. Campbell*, 3 Metc. 209. So, in *Mariner v. Dyer*, 2 Greenl. 185; *Hinman v. Taylor*, 2 Conn. 357; *Robie v. McNiece*, 7 Vt. 419; *Gray v. Fulsome*, Id. 452; *Smith v. Lint*, 37 Me. 546. It being settled, then, that proceedings under this law are to be re-

garded as civil actions, the question is whether there is anything in their nature, or anything to be implied from the provisions of the statute, that requires the personal presence of the respondent at the trial or the rendition of judgment, or that takes such cases out of the general rule that judgment in civil actions may be rendered upon default. The service in these cases is by arrest of the body, and security taken for the appearance of the respondent at the proper court, by bond, and, although the form of the proceeding is more summary, yet in substance it is like the cases of arrest and bail in ordinary civil process; and, upon a careful consideration of the question, we are of the opinion that a trial and judgment may be had without the personal attendance of the respondent, or that judgment may be rendered on default. Indeed, it may be regarded as settled here that the respondent need not be arraigned, but may plead by attorney, from which a strong inference arises that his presence in person is not necessary." In England, under statutes the scope and object of which are similar to ours, it is held that jurisdiction may be acquired by leaving summons at place of residence of accused, and, upon hearing, judgment may be rendered by default, and enforced summarily by arrest and imprisonment, when defendant is within the jurisdiction of the court. *Reg. v. Webb*, 65 Law J. M. Cas. 98; *Reg. v. Lee*, 58 Law T. (N. S.) 384; *Reg. v. De Winton*, 53 J. P. 292, 59 Law T. (N. S.) 382. See, also, *Blood v. Morrill*, 17 Vt. 598; *Chandler v. Commonwealth*, 4 Metc. (Ky.) 66, 68; *Lucas v. Hawkins*, 102 Ind. 64, 1 N. E. Rep. 358.

It is also contended that the default and trial to the court without a jury renders the judgment void, for the reason that section 5 of the act cited above provides for a trial to a jury upon the issue of a plea of not guilty. In this case there was no issue raised by a plea of not guilty. There was no demand for a jury to try an issue not raised by a plea entered by the defendant. By his default he practically confessed the charge. The plaintiff was at liberty to submit her evidence to the court. While the defendant, being present, could demand a jury to try the issues raised, yet he is not, because of his absence, in a position to complain. The court could properly determine the matter without the aid of a jury. *Wolf v. State*,

11 Ind. 231; *Mariner v. Dyer*, 2 Greenl. 165. Even though the statute should be construed as requiring the trial of the issue of defendant's guilt to be submitted to a jury, the failure to observe the requirement would not go to the jurisdiction of the court, but, at most, render the judgment erroneous, the correction of which could not be had by proceedings in *habeas corpus*. *In re Fife*, 110 Cal. 8, 42 Pac. Rep. 299; *Lowery v. Howard*, 103 Ind. 440, 3 N. E. Rep. 124; *State v. Sheriff*, 24 Minn. 87; *Ex parte Miller*, 82 Cal. 454, 22 Pac. Rep. 1113.

The second question of importance is whether the defendant, at the time the *capias* was served upon him, was privileged from arrest by reason of the fact that he had been brought into the jurisdiction of the court, under an extradition warrant, to answer for a crime or charge of which he was discharged, and immediately rearrested on a process issued on the judgment rendered in the case at bar. His counsel contends that the asylum State from which he was extradited was, by the choice of the defendant, made his home, and constituted his domicile, to which he should have been allowed a reasonable time to return, and during such time he was entitled to immunity from arrest, and that the service of the writ was an unlawful act, and the subsequent restraint likewise unlawful. Two subordinate propositions are involved in the consideration of this phase of the case: First, are there any express provisions in the laws and rules governing extradition which are violated, directly or indirectly, by the service of process, civil or criminal, on one who has been extradited to answer a charge of violating the criminal laws, without allowing him the immunity contended for? And, second, is there sound rule or policy of the law in the administration of justice which forbids the service of such a writ without extending the privilege of departing within a reasonable time from the jurisdiction to which a person has been brought against his will, by virtue of the laws providing for rendition and extradition of fugitives from justice, after discharge from custody on the charge by reason of which the requisition was granted? In a late case (*Lascelles v. State of Georgia*, 13 Sup. Ct. 687, 148 U. S. 537, 542, 37 L. Ed. 549) where the question of the rights of such a person was directly in issue, it is stated in the *syllabus*: "As between the States in

the Union, fugitives from justice have no right of asylum, in the international sense; and a fugitive who has been returned by interstate rendition may be tried for other offenses than that for which his return was demanded, without violating any right secured by the Constitution or laws of the United States." Says Mr. Justice Jackson, who wrote the opinion: "The sole object of the provision of the Constitution, and the Act of Congress to carry it into effect, is to secure the surrender of persons accused of crime who have fled from the justice of the State whose laws they are charged with violating. Neither the Constitution nor the Act of Congress providing for the rendition of fugitives upon proper requisition being made confers, either expressly or by implication, any right or privilege upon such fugitives, under and by virtue of which they can assert, in the State to which they are returned, exemption from trial for any criminal act done therein. No purpose or intention is manifested to afford them any immunity or protection from trial and punishment for any offense committed in the State from which they flee. On the contrary, the provisions of both the Constitution and the statutes extend to all crimes and offenses punishable by the laws of the State where the act is done. *Commonwealth v. Dennison*, 24 How. 66, 101, 102, 16 L. ed. 717; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. ed. 250."

If a defendant brought into another State by requisition is not exempt and has no immunity from arrest and prosecution for any crime committed against the laws of the State to which he has been returned, there certainly can be no good reason assigned why he should be exempt from summary proceedings by arrest and imprisonment to enforce a judgment lawfully rendered against him, or be subject and liable to process in any civil action in which a legal obligation rest upon him. The law applicable in both instances, and the reasons therefor, are the same. There is in fact no express authority in the Federal laws regulating the subject of interstate extradition of fugitives from justice granting the immunity claimed; and we must look to the question of a sound policy or rule of law in the administration of justice for the privilege, or its existence must be denied. Some State courts have extended immunity in all cases

from both criminal and civil process, by confusing the laws of extradition as between foreign States and Countries with the law of interstate extradition. This is noted and discussed in the case of *Lascelles v. State of Georgia*, last cited. In many cases immunity from prosecution, civil and criminal, has been extended for a reasonable time because the return of the fugitive was obtained unlawfully or by fraudulent means, or for the purpose of subserving some different or ulterior purpose than that indicated in the proceedings in extradition, such as the collection of a private debt or other like purpose. *In re Robinson*, 29 Neb. 135, 45 N. W. 267, 8 L. R. A. 398, 26 Am. St. Rep. 378; *Compton v. Wilder*, 40 Ohio St. 130. In the case last cited, which is relied on by counsel for the petitioner, it is disclosed that Wilder had been brought from Pennsylvania on a requisition issued by the Governor of the State of Ohio upon application of Compton, Ault & Co.; that he waived an examination, and entered into a recognizance to appear before the Court of Common Pleas; that he was released from custody, and before he could depart was arrested by Compton, Ault & Co. in a civil action against him commenced in the Superior Court; and that he, by motion, asked the court to set aside the service of summons and order of arrest, and to discharge him from custody. The motion was granted, and the case was taken to the Supreme Court. In affirming the judgment discharging the defendant, the Supreme Court said: "In this case this machinery [the extradition] was set in motion by Compton, Ault & Co., by their application to the Governor of Ohio. . . . It was bad faith in Compton, Ault & Co. to commence a civil action . . . before conviction, and before he [Wilder] had an opportunity to return to his home. . . . The temptation to make it [extradition] subservient to private interest is great. . . . [It] has been seen and appreciated by the chief executive of many States, and, to guard against it, rules and regulations are being adopted which may make the extradition of an alleged fugitive, in a proper case, extremely difficult. . . . The certain remedy to prevent its [the abuse of extradition] growth is to deprive all persons who participate in the misuse of the power to extradite persons alleged to be criminals from justice of the fruits resulting from such par-



ticipation." In *Adriance v. Lagrove*, 59 N. Y. 110, the court holds substantially to the same view; "but," says Justice Barrett in *Browning v. Abrams*, 51 How. Prac. 173, "this rule does not apply to persons not concerned in the device." To the same effect, also, is *Slade v. Joseph*, 5 Daly, 187.

In the present case the record is wholly free from any evidence of bad faith, fraud or other unwarranted means in procuring the return of the petitioner to this State to answer to the offense charged, for which he was extradited. It is conceded, as we understand counsel for relator, that the proceeding begun and had upon that charge was in good faith and to subserve only the ends of public justice, and that the plaintiff in the bastardy proceedings, or others connected therewith, were in no wise connected, concerned in, or had anything whatever to do with the criminal charge and prosecution which formed the basis of the extradition proceedings. The privilege from process claimed by the petitioner must be granted, if at all, under the immunity that exists generally in favor of suitors and witnesses attending voluntarily on courts or other tribunals where their presence is required in the furtherance of justice and the due administration of the law. Does the reason for the rule apply in his case, as it exists and is acknowledged in the general class of cases mentioned, where the attendance is voluntary on the part of the person thus privileged? *Williams v. Bacon*, 10 Wend. 636, is an authority bearing on the subject. It is there stated in the *syllabus*: "It is no cause for setting aside an arrest on a *capias* under an order to hold to bail that the defendant was brought into the State as a fugitive from justice." It seems, however, that, had the criminal proceedings been a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him *civiliter*, the defendant would have been discharged. In the opinion it is said by Nelson J.: "The defendant is not within the rule privileging suitors and witnesses from arrest while going to, attending at, or returning from court; for, if so, the rule allowing criminals in custody to be charged in civil actions in the usual way would not have been established, for the privilege would have been an answer to the suit. It would be unjust and unreasonable to extend this privilege to cases of this kind; for it must continue, if it exist



at all, during the whole period of the criminal custody. It might and would lead to great abuse. There is no pretense that the criminal proceeding in this case was a mere pretext to bring the defendant within the jurisdiction of the court for the purpose of proceeding against him *civilliter*." In *Moore v. Greene*, 73 N. C. 394, 21 Am. Rep. 470, it is observed by Rodman, J.: "Parties in civil actions appear in court voluntarily, and should be encouraged to appear, by immunity from arrest, whereas defendants in criminal actions appear involuntarily, and need not be encouraged." In the case of *Reid v. Ham* (Minn.), 56 N. W. Rep. 35, after citing *Lascelles v. State of Georgia*, *supra*, *People v. Cross*, 135 N. Y. 536, 32 N. E. 246, and *Commonwealth v. Wright*, *supra*, it is stated by the author of the opinion: "These decisions logically, if not necessarily, lead to the conclusion that the detention under criminal proceedings affords no exemption or privilege from civil prosecution, and this has been so decided. *Williams v. Bacon*, 10 Wend. 636; *Adriance v. Lagrove*, 59 N. Y. 110." The immunity from service of process extended to suitors and witnesses attending court is founded on consideration of wisdom, and is well calculated to assist in the due administration of justice. It needs no argument to sustain the proposition that whatever encourages the attendance of witnesses at the trial of any case in controversy in the courts will conduce more certainly to a rightful determination, and assure to a party litigant the protection of all his rights guaranteed by law. This desired result can best be accomplished by steadily adhering to a policy which will save to all whose attendance is desirable in the furtherance of the ends of justice, and who come voluntarily, annoyance, inconvenience, and oftentimes oppression, by the service of process upon them while present in any State jurisdiction for the purposes mentioned. This privilege has constantly been safeguarded by the courts, and the rule can doubtless be safely and confidently invoked by all who come within its scope and purview. The petitioner in the case at bar does not, however, come within the reason of the rule. His presence is involuntary and against his will. He was brought into the State forcibly and for the purpose of answering a charge of violating its laws. The reason for extending the rule of immunity is wanting in

his case. If he may rightfully be prosecuted for another crime, he may with equal propriety be held to respond to any civil liability resting upon him. There exists the same reason for granting immunity for the one as the other. There being no positive law granting the privilege, and no good and valid reason existing for extending to the defendant the immunity granted to suitors and witnesses generally, the service of the writ is held to be lawful. The judgment is valid and binding, and an obligation is thereby placed upon the defendant to comply with its terms, which he cannot escape by the present proceeding. His detention appearing to be in conformity with law, the writ prayed for must be denied. Judgment accordingly.

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RICE et al. v. AMES.

180 U. S. 371—21 Sup. Ct. Rep. 406—45 L. Ed. 577.

Decided February 25, 1901.

**EXTRADITION:**\* *Habeas corpus—Right of appeal to Supreme Court—Sufficiency of complaints—Power to appoint commissioners.*

1. Where in a *habeas corpus* case the construction of an international treaty is involved, an appeal lies directly to the Supreme Court.
2. A complaint based simply on information and belief, and not giving the grounds of such belief, is not a valid basis for extradition proceedings; but where the complaint contains one count on information and belief and three counts in the positive form, as of personal knowledge, the three good counts will be sustained.
3. The statutes of Illinois prohibiting continuances, by examining magistrates, for more than ten days, does not apply to cases of international extradition.
4. Congress has power under article 2, section 2, paragraph 2, of the United States Constitution, to authorize district or circuit judges to appoint commissioners with judicial powers in international extradition proceedings.
5. "The technicalities of an indictment are not requisite in a complaint."

Appeal from the District Court of the United States for the Northern District of Illinois from an order denying an application for discharge upon a writ of *habeas corpus*. Affirmed.

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\*See EXTRADITION in Table of Topics.

Statement by Mr. Justice Brown:

This was an appeal by Fred Lee Rice, Frank Rutledge, and Thomas Jones from an order of the District Court for the Northern District of Illinois, denying their application for a discharge upon a writ of *habeas corpus*, the object of which writ was to test the validity of certain proceedings against the appellants, taken before a commissioner for that district, specially authorized to take jurisdiction of proceedings for the extradition of persons charged with crimes, under treaties with foreign governments.

The proceedings before the commissioner are set forth in a bill of exceptions signed by the district judge.

The first warrant for the arrest of the appellants was issued June 2, 1900, upon complaint made upon information and belief, by "a police officer of the city of Chicago," and an affidavit of a police detective of the city of Toronto, Canada, also upon information and belief, charging defendants with sundry crimes committed both at Aurora and at Toronto, in the province of Ontario. Pursuant to this warrant appellants were taken by the respondent, Ames, as United States marshal, out of the custody of the city police, by whom they had been arrested the day before, and brought before the commissioner. Proceedings were adjourned until June 4, when the case was dismissed, and a new warrant issued upon the complaint of Albert Cuddy, police detective of the city of Toronto, also upon information and belief. Defendants moved to quash this complaint and warrant by reason of the fact that the complaint was made upon information and belief, which was denied, and the proceedings adjourned until June 14. Defendants were committed for further hearing. Upon that day, it appearing that the proceedings had been taken only for the purpose of provisional apprehension and detention, the case was dismissed, and a new and final complaint made by William Greer, a government detective for the province of Ontario, duly authorized by the Attorney General of the province to act as the agent of the Government in the prosecution of extradition proceedings.

This complaint contained four counts, the first of which charged the defendants, upon information and belief, with steal-

ing from the postoffice building in the town of Aurora, a quantity of Canadian postage stamps, \$55 in money, and certain certificates in mining stock. The other three counts, in which the charge was made absolutely, and not upon information and belief, charged the defendants, first, with stealing a horse, cart, and harness; second, with breaking and entering a private bank in the town of Aurora with intent to steal, and also with the larceny of certain money in the bank; and, third, with breaking into a shop on Queen street, in the city of Toronto. A new warrant was issued upon this complaint, and the examination adjourned until June 25, at which time defendants were brought before the commissioner, and motion made for their discharge for want of jurisdiction and for insufficiency of the complaint. This motion being denied, the case went to a hearing upon certain documents certified by the American counsel, and a large number of depositions of witnesses which were not sent up with the record. The examination was continued for several days, and finally upon July 10 the commissioner found there was probable cause to believe the defendants guilty, and ordered them to stand committed to await the action of the proper authorities.

Whereupon, and upon the same day, petitioners sued out this writ of *habeas corpus* from the District Court; and from the order of that court denying their discharge, they took an appeal directly to this court.

*Mr. Samuel H. Trude*, for appellants.

*Mr. Lynden Evans* for appellee.

Mr. Justice Brown delivered the opinion of the court:

1. Motion is made to dismiss the appeal upon the ground that there is no provision of law allowing an appeal in this class of cases. Prior to the Court of Appeals Act of 1891, provision was made for an appeal to the Circuit Court in *habeas corpus* cases "from the final decision of any court, justice, or judge inferior to the Circuit Court." (Rev. Stats., § 763); and from the final decision of such Circuit Court an appeal might be taken to this court. Rev. Stat., § 764, as amended March 3, 1885 (23 Stat. at L. 437, chap. 353).

The law remained in this condition until the Court of Appeals Act of March, 1891 [26 Stat. at L. 828, chap. 517], was passed, the 5th section of which permits an appeal directly from the District Court to this court "in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question." In this connection the appellee insists that an appeal will not lie, but that a writ of error is the proper remedy. In support of this we are cited to the case of *Bucklin v. United States*, 159 U. S. 680, 40 L. ed. 304, 16 Sup. Ct. Rep. 182, in which the appellant was convicted of the crime of perjury, and sought a review of the judgment against him by an appeal, which we held must be dismissed upon the ground that criminal cases were reviewable here only by writ of error. Obviously that case has no application to this, since under the prior sections of the Revised Statutes, above cited, which are taken from the act of 1842, an appeal was allowed in *habeas corpus* cases. The observation made in the *Bucklin Case*, that "there was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error," may be supplemented by saying that it was no purpose of the act of 1891 to change the forms of remedies theretofore pursued.

*Re Lennon*, 150 U. S. 393, 37 L. ed. 1120, 14 Sup. Ct. Rep. 123; *Ekin v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Gonzales v. Cunningham*, 164 U. S. 612, 41 L. ed. 572, 17 Sup. Ct. Rep. 182. As a construction of the extradition treaty with Great Britain is involved, the appeal was properly taken to this court.

2. The first assignment of error is to the effect that the commissioner issuing the warrant had no jurisdiction, because the complaint of Greer was upon information and belief, and not such as was required by the treaty, or by section 5270 of the Revised Statutes. The first two complaints, which were dismissed, as well as the first count of the complaint under which the proceedings were finally had, were obviously insufficient, since the charges were made solely upon information and belief, and no attempt was made even to set forth the sources of information or the grounds of affiant's belief. This is bad, even in ex-

tradition proceedings, which are entitled to as much liberality of construction in furtherance of the objects of the treaty as is possible in cases of a criminal nature. Nor is it saved by the fact that Greer described himself as government detective for the province of Ontario and duly authorized by the Attorney General to act as the agent of the Government to prosecute extradition proceedings. *Ex parte Smith*, 3 McLean, 121, 135 Fed. Cas. No. 12,968; *Ex parte Lane*, 6 Fed. Rep. 34; *Re J. L. Young Mfg. Co.* [1900], 2 Ch. 753.

A citizen ought not to be deprived of his personal liberty upon an allegation which, upon being refuted, may amount to nothing more than a suspicion. While authorities upon this subject are singularly few, it is clear that a person ought not to be arrested upon a criminal charge upon less direct allegations than are necessary to authorize the arrest of a fraudulent or absconding debtor. *Smith v. Luce*, 14 Wend. 237; *Re Bliss*, 7 Hill, 187; *Proctor v. Prout*, 17 Mich. 473. So, too, in applications for injunctions, the rule is that the material facts must be directly averred under oath by a person having knowledge of such facts. *Waddell v. Bruen*, 4 Edw. Ch. 671; *Armstrong v. Sanford*, 7 Minn. 49, Gil. 34.

We do not wish, however, to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. This would defeat the whole object of the treaty, as we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings. This is obviously impossible. The ordinary course is to send an officer or agent of the Government for that purpose, and Rev. Stat., § 5271, makes special provision that in every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants, or other papers shall, if authenticated according to the law of



such foreign country, be in like manner received as evidence, of which authentication the certificate of the diplomatic or consular officer of the United States shall be sufficient. This obviates the necessity which might otherwise exist of confronting the accused with the witnesses against him. Now, it would obviously be inconsistent to hold that depositions, which are admissible upon the hearing, should not also be admitted for the purpose of vesting jurisdiction in the commissioner to issue the warrant. Indeed, the words of the statute, "in every case of *complaint*," seems to contemplate this very use of them. If the officer of the foreign government has no personal knowledge of the facts, he may with entire propriety make the complaint upon information and belief, stating the sources of his information and the grounds of his belief, and annexing to the complaint a properly certified copy of any indictment or equivalent proceeding, which may have been found in the foreign country, or a copy of the depositions of witnesses having actual knowledge of the facts, taken under the treaty and act of Congress. This will afford ample authority to the commissioner for issuing the warrant.

But while, as already observed, the first count is bad by reason of its unsupported allegations upon information and belief, the second count contains a wholly different charge of larceny of a horse, cart, and harness; the third of breaking and entering a private bank in Aurora; and the fourth of breaking and entering a building in Toronto. Each of these counts charges a distinct offense, and each purports on its face to be made upon the personal knowledge of the complainant. While it is possible that he may have intended to make all these charges upon information and belief, the natural intendment of the last three counts is that the affiant swore to facts within his personal knowledge. If it be true, as stated by writers upon criminal procedure (Bishop, *Crim. Pro.*, § 429), that each count must be sufficient in itself, and averments in one cannot aid defects in another, it would seem to follow by parity of reasoning that defects in one ought not to impair the sufficiency of another. Upon the whole we think the complaint is sufficient.

3. By the second assignment, petitioners insist that the commissioner lost jurisdiction in the premises by continuing the



proceedings from June 14 to June 25, a period of eleven days, in supposed violation of section 67, article 7, of chapter 79, of the Revised Statutes of Illinois, governing continuances by justices of the peace and examining magistrates, which enacts that "the justice before the commencement of the trial may continue the case *not exceeding ten days* at any one time on consent of the parties or on any good cause shown." It is insisted that this statute controls proceedings before commissioners of the United States in extradition cases, by virtue of the treaty and of the several acts of Congress prescribing the duties of commissioners. The treaty only provides in article 6 (26 Stat. at L. 1508, 1510), that "the extradition of fugitives under the provisions of this convention and of the said 10th article" (of the treaty of August 9, 1842) "shall be carried out in the United States and in Her Majesty's dominions respectively, in conformity with the laws regulating extradition, for the time being in force in the surrendering States." This evidently contemplates the laws of the United States regulating extradition, and has no reference whatever to the laws of the particular State within which the proceedings are taken.

Provision is made by Revised Statutes, section 627, for the appointment of commissioners of the Circuit Court (now called United States commissioners' act May 28, 1896, § 19, 29 Stat. at L. 140, chap. 252), who shall exercise such powers as may be conferred upon them. By Revised Statutes, section 727, they are vested with such authority "to hold to security of the peace and for good behavior in cases arising under the Constitution and laws of the United States, as may be lawfully exercised by any judge or justice of the peace of the respective States in cases cognizable before them." This evidently defines the extent of their powers, and not the mode in which such powers are to be exercised. By section 1014 they are vested with the power to arrest, imprison, or bail offenders "for any crime or offense against the United States" "agreeably to the usual mode of process against offenders in such State," that is, the State wherein the offender "may be found." That this has no application to continuances before commissioners in extradition proceedings is evident, first, by the fact that the section is confined to crimes or offenses against the United States, and, second, be-

cause it refers only to the usual mode of *process* against offenders in such State, and not to the incidents of the examination. To hold that the commissioner is confined in the matter of continuances to the methods prescribed for justices of the peace and other magistrates of the particular State would be utterly destructive of his power in cases arising beyond the seas, where weeks might be required to obtain the attendance of witnesses or the procurement of properly authenticated depositions for use upon the examination. Clearly there is nothing either in the treaty or the statutes requiring commissioners to conform to the State practice in that regard. The only requirement seems to be that arising from the 10th section of the Ashburton Treaty, that the fugitive shall only be surrendered "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed."

4. The fifth assignment questions the constitutionality of Revised Statutes, section 5270, first, because it does not provide for any mode of procedure relating to continuances, change of venue, bail, etc., before commissioners appointed in extradition matters; second, because Congress had no power to confer upon a district judge of the United States authority to create such inferior courts; third, because Congress had not created such court and established its jurisdiction. We are unable to appreciate the force of this objection. Congress having provided for commissioners, who are not judges in the constitutional sense, had a perfect right under article 2, section 2, paragraph 2, of the Constitution, to invest the District or Circuit Courts with the power of appointment. The only qualification required of a commissioner to act in extradition cases is that suggested by Revised Statutes, section 5270, that he shall be "authorized so to do by any of the courts of the United States." We know of no authority holding that Congress may not vest the courts with this power, and we are reluctant to create one.

The other assignments question the power of the commissioner to deny bail, which becomes immaterial here, as well as the finding of the district judge upon the facts, which is not examinable upon a writ of *habeas corpus*. There is nothing, too,

in the additional assignment that the commissioner took the matter under advisement and abused his discretion in the matter of continuance, of which we see no evidence.

There are also noticed in appellant's brief certain objections to the complaint, which might have been successfully urged against a formal indictment for the same offense, but which do not constitute "a plain error not assigned or specified," of which, under rule 21 of this court, subd. 4, we may take notice at our option in the absence of a special assignment. The technicalities of an indictment are not requisite in a complaint. *State v. Holmes*, 28 Conn. 230; *Commonwealth v. Keenan*, 139 Mass. 193, 20 N. E. Rep. 477; *Rawson v. State*, 19 Conn. 202; *Keeler v. Milledge*, 24 N. J. L. 142; *Williams v. State*, 88 Ala. 80, 7 So. Rep. 101; *State v. McLaughlin*, 35 Kan. 650, 12 Pac. Rep. 32.

Petitioners have no just reason to complain of the action of the District Court in remanding them to the custody of the marshal, and its judgment is therefore affirmed.

NOTES (by J. F. G.).—An affidavit or complaint made simply on information and belief is not a sufficient basis for a warrant.—In addition to the authorities mentioned in the opinion we would suggest the following: *Lippman v. People*, 175 Ill. 101, 51 N. E. Rep. 872, 11 Am. Crim. Rep. 356; *Ex parte Dimmig*, 74 Cal. 164, 15 Pac. Rep. 619; *State v. McGahey*, 97 N. W. Rep. 865; *Schustek's Case*, 11 Am. Crim. Rep. 372; *State v. Gleason*, 32 Kan. 345, 5 Am. Crim. Rep. 172; *Johnston v. United States*, 30 C. C. A. 612, 87 Fed. Rep. 187, 11 Am. Crim. Rep. 349; *Ex parte Hart*, 11 C. C. A. 165, 63 Fed. Rep. 249; *United States v. Collins*, 79 Fed. Rep. 65; *United States v. Sapinkow*, 90 Fed. Rep. 654; *United States v. Tureaud*, 20 Fed. Rep. 621; *Ex parte Morgan*, 20 Fed. Rep. 298.

An affidavit charging a crime should state the facts at least as clearly as is required by indictment.—This doctrine is announced in *People v. Brady*, 56 N. Y. 182 (190), which was also an extradition case. The case is a recognized authority on the law of extradition. The reason for the doctrine is manifest. An indictment is of the nature of a pleading, based upon oral evidence heard by the grand jury; while a criminal complaint in the form of an affidavit, is the evidence on which the warrant is based. The evidence, to justify the issuance of a warrant, must show facts amounting to probable cause. Under the peculiar statutes in Wisconsin and Michigan, it has been held that a warrant is based upon oral evidence heard by the magistrate; but in those States the Constitution does not require the probable cause to be shown by the affidavit. In Illinois where the Constitution requires the probable cause to be supported by affidavit, it has been held in a very well con-

sidered opinion that the evidence of probable cause must "be made a permanent record in the form of an affidavit." (*Lippman v. People*, *supra*.)

This doctrine applies to all cases, civil as well as criminal. In *Sheridan v. Briggs*, 53 Mich. 569, 19 N. W. Rep. 189, an affidavit charging false pretenses, upon which a *capias ad respondendum* had issued, was held bad because it did not set out the facts as specifically as should be. In passing upon the case the court, after citing authorities, said:

"The principle deducible from these cases is that an affidavit which is used as the basis of a writ which will deprive a person of his liberty, must not only set forth the facts and circumstances in detail, and not conclusions or inferences from facts, but they must be facts within the personal knowledge of the deponent.

"Applying these principles to the affidavit in question, it appears to be defective in that portion which contradicts the alleged representations; their falsity does not appear to be alleged upon the personal knowledge of the deponent, and the statements respecting the falsity of the representations are too indefinite to possess the quality of legal proof. If deponent was called to the witness stand for the purpose of proving the falsity of the representations, it would not be competent for him to testify in the general loose and vague manner contained in his affidavit. Such testimony would not be admissible to establish the fact that the representations made were false. The affidavit upon which a person is held to bail must be of the same legal quality, as evidence, as would be required at the trial to establish the facts set up or relied on for cause of arrest.

"The authorities referred to in plaintiff's brief apply to cases of pleadings, and not to affidavits or examinations which form the basis of a writ or warrant to arrest or imprison a person. What would be quite sufficient in a pleading, would, in most instances, be entirely insufficient in an affidavit to hold to bail. The reason is obvious. In pleadings, the evidence is not required to be set forth. But no arrest can be made except upon sworn evidence of facts."

*Requisites of an affidavit.*—An affidavit is a written statement of material facts, in which the statements are made, with that degree of positiveness and clearness, that, if falsely made, the affiant is subject to the penalties for perjury. *Miller v. Munson*, 34 Wis. 527; *Neal v. Gordon*, 60 Ga. 112; *Peers v. Carter*, 4 Litt. 269; *People v. Becker*, 20 N. Y. 354; *Schustek's Case*, 11 Am. Crim. Rep. 372; *People v. Heffron*, 53 Mich. 527; *Ex parte Dimmig*, 74 Cal. 164; *Ex parte Lane*, 6 Fed. Rep. 34; *Myers v. People*, 67 Ill. 503.

*Complaint under section 5270, United States Revised Statutes.*—Section 5270, United States Revised Statutes, authorizes a warrant to issue "upon complaint made under oath." If this implies a complaint in writing, then it must possess all of the essential requisites of an affidavit, and the statements of fact made in it must be made with that degree of certainty that if falsely made the affiant is liable to the penalties for perjury. In matters of form it need not be as full as an indictment, but it certainly should be as clear in statements of fact. *Vandever v. State*, 11 Am. Crim. Rep. 365.

The authorities cited in the opinion in *Rice v. Ames* do not fully sustain the inference drawn by the court.

In *State v. Holms*, 28 Conn. 230, the court held that a complaint made by a grand jury was not bad because of duplicity, two charges being made in one complaint.

In *Rawson v. State*, 19 Conn. 292, the complaint charged the offense as committed "on or about the 24th day of May, 1847." The court held that the words "*on or about*" did not vitiate the complaint, nor did the use of figures in stating the date.

In *Keeler v. Milledge*, 24 N. J. L. 144, the complaint was quashed, it being bad in substance; but the court intimated that the ancient rule as to informations by a common informer was in some degree relaxed. The complaint in that case was for an alleged violation of a city ordinance. In speaking of complaints the court said: "It is sufficient if they set out with clearness the offense charged and the substance of that part of the ordinance which has been violated, with a reference to the title, the date, and section. This much, however, it ought to contain, for the office of the complaint is not only to give the magistrate jurisdiction, but eventually to apprise the party of what offense he is charged with; and it answers neither of these purposes with certainty, unless it contains these particulars."

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### GRIN V. SHINE.

187 U. S. 181—23 Sup. Ct. Rep. 112—47 Law Ed. 130.

Decided December 1, 1902.

EXTRADITION: \* *Practice—Good faith—Construction of treaty—Requirements of the complaint.*

1. The exercise of good faith with foreign nations does not obligate us to surrender persons charged as fugitives from justice, in violation of well settled principles of criminal procedure.
2. "Treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to the other powers, without sacrificing the legal or constitutional rights of the accused."
3. "Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice or forcing the surrender of political offenders."
4. Foreign powers and their agents are not presumed to be versed in the niceties of our criminal practice; accordingly a substantial compliance with the rules of criminal procedure is sufficient.
5. In international extradition proceedings, the complaint need not be taken before a commissioner or judge empowered to issue the warrant.

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\*See EXTRADITION in Table of Topics.

6. The court will presume that one who signs his name as a commissioner and who in the proceeding is so recognized by the Circuit Court, appears as a United States commissioner.
7. The judge who issued the warrant did not err in making it returnable before a United States commissioner. "The commissioner is in fact an adjunct to the court, possessing independent, though subordinate, judicial powers of his own."
8. The charge in the complaint, that the alleged fugitive embezzled money was received by the accused "in his capacity as clerk," is sufficient to indicate that it was in his care "by virtue of his employment."
9. In such allegations the complaint need not be as accurate as an indictment.
10. Other similar technical objections are disposed of under heading "6" of the opinion.
11. The treaty provision, that a copy of the warrant of arrest must accompany the requisition, is complied with by the copy of an order for arrest, made in compliance with the law of the demanding country. (*Dictum*, Congress can by its own law provide for the extradition of criminals independent of the provisions of the treaty.)
12. The word "indictment," when used in international treaties, is not limited to the Anglo-Saxon definition.
13. The ambassador's certificate to the depositions, that they "are properly and legally authenticated so as to entitle them to be received and admitted as evidence for similar purposes by the tribunal of Russia," is sufficient.

Appeal from the Circuit Court of the United States for the Northern District of California, from a judgment remanding the relator. Affirmed.

Statement by Mr. Justice Brown:

This was an appeal from a judgment of the Circuit Court for the Northern District of California, dismissing a writ of *habeas corpus* sued out by Grin, and remanding him to the custody of the defendant, marshal for the Northern District of California, who held him under a *mittimus* issued by a commissioner in certain proceedings under a treaty with the Emperor of Russia for the extradition of criminals, proclaimed June 5, 1893. 28 Stat. 1071.

These proceedings were begun by a complaint of Paul Kosakevitch, Russian consul at the city of San Francisco, stating, in substance, that on March 6, 1901, Grin, a Cossack of the Don and a Russian subject, in the employment of the firm of E. L. Zeefo & Co., doing business in the city of Rostov, on the river



Don, in the Empire of Russia, embezzled the sum of 25,000 roubles, "intrusted to and received by" him in his capacity as "clerk" of such firm, and that he had subsequently absconded and taken refuge in San Francisco; that he had been indicted in Russia for the embezzlement of the money, and that a mandate had been issued by the Department of State in Washington directing the necessary proceedings to be had in pursuance of the laws of the United States, in order that the evidence of his criminality might be heard and considered. The complaint was sworn to before George E. Morse, United States commissioner, with the usual power to take affidavits, but not specially authorized by any court of the United States to take proceedings in extradition; that upon such complaint the judge of the District Court for the Northern District of California issued a warrant of arrest, and directed that petitioner, when arrested, should be brought before E. H. Heacock, Esquire, United States commissioner, for examination and further proceedings; that, at the time such warrant was issued, Heacock was not authorized to take jurisdiction of extradition proceedings, and that the evidence before him failed to show that the petitioner had committed the crime of embezzlement.

Several other defects in the extradition proceedings are set forth in the petition, and so far as they are deemed material, appear hereafter in the opinion.

Upon a hearing upon this petition the Circuit Court made an order remanding the petitioner to the custody of the marshal, and an appeal was thereupon taken to this court. *Re Grin*, 112 Fed. Rep. 790.

Mr. George D. Collins, for appellant.

Messrs. H. G. Platt and Richard Bayne, for the Russian Government.

Mr. Justice Brown delivered the opinion of the court:

We shall only notice such alleged defects in the extradition proceedings as are pressed upon our attention in the briefs of counsel. While these defects are of a technical character, they are certainly entitled to respectful and deliberate consideration. Good faith towards foreign powers, with which we have entered



into treaties of extradition, does not require us to surrender persons charged with crime in violation of those well-settled principles of criminal procedure which from time immemorial have characterized Anglo-Saxon jurisprudence. Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defenses as others accused within our own jurisdiction.

We are not prepared, however, to yield our assent to the suggestion that treaties of extradition are invasions of the right of political habitation within our territory, or that every indictment in proceedings to carry out these treaties shall be in favor of the party accused. Such treaties are rather exceptions to the general right of political asylum, and an extension of our immigration laws prohibiting the introduction of persons convicted of crimes (18 Stat. 477 [chap. 141, U. S. Comp. Stat. 1901, p. 1285]), by providing for their deportation and return to their own country, even before conviction, when their surrender is demanded in the interests of public justice. There is such a general acknowledgment of the necessity of such treaties, that of late, and since the facilities for the escape of criminals have so greatly increased, most civilized powers have entered into conventions for the mutual surrender of persons charged with the most serious nonpolitical crimes. These treaties should be faithfully observed, and interpreted with a view to fulfill our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused.

In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to do, *viz.*, submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical noncompliance with some formality of criminal procedure should not be al-

lowed to stand in the way of a faithful discharge of our obligations. Presumably, at least, no injustice is contemplated, and a proceedings which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community is rather to be welcomed than discouraged.

1. The first assignment of error is that the commissioner had no jurisdiction over the case, inasmuch as at the time the warrant of arrest was issued he had not been authorized to act in extradition proceedings by any of the courts of the United States under Revised Statutes, section 5270 [U. S. Comp. Stat. 1901, p. 3591], which reads as follows:

"Sec. 5270. Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District or Territory with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Under this section it is plain, first, that the commissioner must be specially authorized to act in extradition cases; second, that a complaint must be made under oath charging the crime; third, that a warrant must issue for the apprehension of the

person; fourth, that he must be brought before such justice, judge, or commissioner to the end that the evidence of criminality may be heard and considered; fifth, that the commissioner shall certify the evidence to the Secretary of State, that a warrant may issue for the surrender. There is certainly no requirement here that the commissioner shall be authorized to act before he assumes to act, and in this case there is no evidence that he assumed to act until after October 17, 1901, when he was specially appointed for that purpose. The day upon which the petitioner was brought before the commissioner, Heacock, does not appear, but his commitment is dated November 19, 1901. The warrant upon which he was arrested was issued October 17, the day upon which the commissioner was specially authorized to act.

It is true that a warrant of arrest can only issue under section 5270 [U. S. Comp. Stat. 1901, p. 3591], upon a complaint made under oath; but there is no requirement that the oath shall be taken before a commissioner authorized to act in extradition proceedings, or even before the judge or commissioner who issues the warrant of arrest. While we are bound to give the person accused the benefit of every statutory provision, we are not bound to import words into the statute which are not found there, or to say that the judge issuing the warrant may not receive an oath taken before a commissioner authorized generally to take affidavits. There is no evidence that Mr. Morse, who took this complaint, was not a United States commissioner appointed under the act of May 28, 1896. 29 Stat. 184 [chap. 252, U. S. Comp. Stat. 1901, p. 499], and the fact that he signs his name as such, and that he was recognized as such by the Circuit Court in this proceeding, is sufficient evidence of his authority. It is true the district judge, who issued this warrant of arrest, might himself have administered the oath, but he was equally at liberty to act upon a complaint sworn to before a United States commissioner.

2. Nor did the district judge, who issued the warrant, exceed his powers in making it returnable before a commissioner, who upon the same day was specially designated to act in extradition proceedings. It is true that the statute provides (§ 5270 [U. S. Comp. Stat. 1901, p. 3591]), that the person before

whom the complaint is made may "issue his warrant for the apprehension of the person so charged, that he may be brought before *such* justice, judge, or commissioner to the end that the evidence of criminality may be heard and considered;" but the practice in this as in other proceedings of a criminal or quasi-criminal nature has been to make the warrant returnable before the magistrate issuing the warrant, or some other magistrate competent to take jurisdiction of the proceedings. In the *Heinrich Case*, 5 Blatchf. 414 (Fed. Cas. No. 6,369), the complaint was made before Commissioner White, was laid before Mr. Justice Nelson of this court, who issued his warrant returnable before himself or Commissioner White. No objection was made to the proceedings for this reason, though the case was vigorously contested upon other grounds, notably because the warrant was executed without the limits of the district, and within the State of Wisconsin. The fact that the point was not made in the case certainly indicates that it was not considered by counsel to be even a plausible ground for quashing the proceedings.

The commissioner is in fact an adjunct of the court, possessing independent, though subordinate, judicial powers of his own. If the district judge, acting under section 5270 [U. S. Comp. Stat. 1901, p. 3591], had made the warrant returnable before himself, there could be no doubt of its legality; and in such case, upon the return of the warrant with the prisoner in custody, he might refer the case to the commissioner to examine the witnesses, hear the case, and report his conclusions to the court for its approval. If he could do that, we see no objection to his referring the case directly to the commissioner by making the warrant returnable before him, inasmuch as the latter possesses the same power with respect to the extradition of criminals as the district judge himself. It may be said that technically the warrant should be made returnable before the magistrate issuing it, but where it is made returnable before another officer, having the same power and jurisdiction to act, we do not think it is fairly open to criticism.

This practice is by no means unknown under the criminal laws of the several States. Thus, in *Commonwealth v. O'Connell*, 8 Gray, 464, it was held that a mere grant of "exclusive jurisdiction" to a police court over certain offenses did not ex-

clude the authority of justices of the peace to receive complaints and issue warrants returnable before that court. To the same effect are *Commonwealth v. Pindar*, 11 Met. 539; *Commonwealth v. Roark*, 8 Cush. 210; *Commonwealth v. Wolcott*, 110 Mass. 87; *Hendee v. Taylor*, 29 Conn. 448.

No objection seems to have been taken to the proceedings before the commissioner upon the ground that he did not issue the warrant, and as he was fully vested with authority to act in extradition cases we do not think the fact that the judge, for the convenient despatch of business, made his warrant returnable before such commissioner can be made available upon a writ of *habeas corpus*.

3. The eighth assignment of error turns upon the sufficiency of the charge of embezzlement. The first article of the extradition treaty with Russia of June 5, 1893 (28 Stat. at L. 1071), after providing for the mutual surrender of fugitive criminals from one country to another, declares that "this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime or offense had been there committed." We do not deem it necessary to inquire whether the words "evidence of criminality" include a definition of the crime charged or to determine by what law the elements of the crime of embezzlement are fixed. Moore, Extradition, § 344. As the petitioner has sought to apply the definition of embezzlement given in the law of California as likely to be most favorable to himself, and the prosecution has assented to this view, we assume for the purposes of this case that this is the definition contemplated by the treaty.

Section 508 of the Penal Code of California is as follows:

"Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

Objection is made to the complaint upon the ground that there is no allegation that the money embezzled came into his

control or care "by virtue of his employment" as such clerk, the allegation being that Grin was employed as clerk; that while so employed the money was intrusted to and received by him "in his capacity as clerk," as aforesaid. Whatever might be the force of an objection to an indictment that it does not set out in the exact language of the statute the fact that the money came into his possession by virtue of his employment, we think that the complaint in this particular is clearly sufficient. It is a general principle of criminal law that the complaint need not set forth the crime with the particularity of an indictment, and that it is sufficient, if it fairly apprises the party of the crime of which he is charged. If there be any distinction at all between an allegation that money came into the possession of a person by virtue of his employment as clerk, and in his capacity as clerk, it is too shadowy to be made a matter of exception to the complaint.

4. Equally unfounded is it that the complaint is defective because it does not use the word "fraudulently," the allegation being "that the accused wrongfully, unlawfully, and feloniously appropriated said money." As the word "embezzled" itself implies fraudulent conduct on the part of the person receiving the money, the addition of the word "fraudulent" would not enlarge or restrict its signification. Indeed, it is impossible for a person to embezzle the money of another without committing a fraud upon him. The definition of the word "embezzlement" is given by Bouvier as "the fraudulent appropriation to one's own use of the money or goods intrusted to one's care by another." In *San Francisco v. Randall*, 54 Cal. 408, a complaint that defendant did "wilfully, unlawfully, and feloniously embezzle and convert" certain securities to his own use, was held to be a sufficient compliance with section 1426 of the Penal Code, requiring the offense charged to be set forth "with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint." The complaint in this case differs from that only in the substitution of the word "wrongfully" for the word "wilfully," and we think it is clearly sufficient. As the word "embezzle" implies a fraudulent intent, the addition of the word "fraudulently" is mere



surplusage. *Reeves v. State*, 95 Ala. 31 (11 So. Rep. 158); *United States v. Lancaster*, 2 McLean, 431 (Fed. Cas. No. 15,556); *State v. Wolff*, 34 La. Ann. 1153; *State v. Trolson*, 21 Nev. 419 (32 Pac. Rep. 930); *State v. Combs*, 47 Kan. 136 (27 Pac. Rep. 818). We express no opinion as to whether it would be necessary in an indictment.

5. It is further insisted that the treaty requires an authenticated copy of the warrant of arrest or of some other equivalent judicial document, issued by a judge or magistrate of the foreign government duly authorized so to do, and that there is no such process in the record as a warrant of arrest or its equivalent. It is true that article 6 of the treaty provides that "when the person whose surrender is asked shall be merely charged with the commission of an extraditable crime or offense, the application for extradition shall be accompanied by an authenticated copy of the warrant of arrest or of some other equivalent judicial document, issued by a judge or a magistrate duly authorized to do so." But it can hardly be expected of us that we should become conversant with the criminal laws of Russia, or with the forms of warrants of arrest used for the apprehension of criminals. The clause is satisfied by the production of an equivalent document. On examination of the record we find a certified copy of an order by one purporting to act as an examining magistrate, and reciting that "having investigated the preliminary examination concerning the accusation of the Cossack, Simeon Grin," and that "as he is hiding under a false name, and, as is seen from his letters, is looking out for means to prevent his arrest and the finding out of his address by the authorities, his temporal place of residence being known at present," pursuant to article 389 of the Criminal Code of Procedure, "he is ordered to be brought to the city of Rostov, on the Don, in order to be placed at the disposition of the examining magistrate of the Taganrog Circuit Court." This order purports, not only to be signed, but sealed, by the examining magistrate Okladnykh, and while it is not in the form of a warrant of arrest as used in this country, it is evidently designed to secure the apprehension of the accused, and his production before an examining magistrate. This seems to us a sufficient compliance with the treaty. If not a warrant of arrest it is an equivalent



judicial document, issued by a judge or magistrate authorized to do so.

But there is another consideration in this connection which should not be overlooked. While the treaty contemplates the production of a copy of a warrant of arrest or other equivalent document, issued by a magistrate of the Russian Empire, it is within the power of Congress to dispense with this requirement, and we think it has done so by Revised Statutes, section 5270 [U. S. Comp. Stats. 1901, p. 3591], hereinbefore cited. The treaty is undoubtedly obligatory upon both powers, and, if Congress should prescribe additional formalities than those required by the treaty, it might become the subject of complaint by the Russian Government and of further negotiations. But notwithstanding such treaty, Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro v. De Uriarte*, 16 Fed. Rep. 93. This appears to have been the object of section 5270 [U. S. Comp. Stat. 1901, p. 3591], which is applicable to all foreign governments with which we have treaties of extradition. The requirements of that section, as already observed, are simply a complaint under oath, a warrant of arrest, evidence of criminality sufficient to sustain the charge under the provisions of the proper treaty or convention, a certificate by the magistrate of such evidence and his conclusions thereon, to the Secretary of State. As no mention is here made of a warrant of arrest, or other equivalent document, issued by a foreign magistrate, we do not see the necessity of its production. This is one of the requirements of the treaty which Congress has intentionally waived. Moore, Extradition, § 70.

6. Again, it is alleged that although the complaint sets forth that criminal proceedings have been instituted in Russia, and that Grin has been therein "indicted" for embezzlement, no indictment has ever been found, and that no other evidence of criminality can be received. It is obvious that the word "indictment," as it appears in this complaint, was used in the general sense of charged or accused by legal proceedings, and not in the technical sense of an indictment as here understood. An

indictment is a technical word peculiar to Anglo-Saxon jurisprudence, and implies the finding of a grand jury. To give it the construction contended for would require us to know what an indictment was under the laws of Russia and to inspect it, at least so far as to ascertain the charge for which the conviction of the accused is sought. No indictment was necessary to be produced under this complaint, the proceeding being governed by section 5 of the Act of August 3, 1882 (22 Stat. at L. 216 [chap. 378, U. S. Comp. Stat. 1901, p. 3595]):

"That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States [ §§ 5270 and 5271, U. S. Comp. Stat. 1901, pp. 3591, 3593], such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so far as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant, or other paper, or copies thereof, so offered, are authenticated in the manner required by this act."

The sufficiency of such evidence to establish the criminality of the accused for the purposes of extradition cannot be reviewed upon *habeas corpus*. *In re Oteiza y Cortes*, 136 U. S. 330. (*Oteiza y Cortes v. Jacobus*, 34 L. Ed. 464, 10 Sup. Ct. Rep. 1031.)

7. It is further insisted that the depositions and other documents which appear in the record have not been properly and legally authenticated. The certificate of the ambassador in that connection is that these papers "are properly and legally authenticated so as to entitle them to be received and admitted as evidence for similar purposes by the tribunals of Russia." As this is a literal conformation to the above statute, adding only the words, "as evidence," it is difficult to see in what respect it is deficient. If we were to hold that a certificate in the language of the statute was insufficient, the certifying officer would be at

once embarked upon a sea of speculation as to the proper form of such certificate, and would be utterly without a guide in endeavoring to ascertain what the requirements of the law were in that particular. All that was decided in the case of *Luis Oteiza*, 136 U. S. 330, in this connection was that depositions and other papers authenticated and certified as required by the act, were not admissible on the part of the accused. The introduction of the words "as evidence" does not vitiate the certificate. We find it difficult to conceive any other purpose for which such depositions could be used except as evidence of criminality.

8. No evidence was required that the Russian consul had authority to make the complaint. All that is required by section 5270 [U. S. Comp. Stat. 1901, p. 3591], is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government having knowledge of the facts, or, in the absence of such person, by the official representative of the foreign government, based upon depositions in his possession, although under the first article of the treaty the accused can only be *surrendered* upon a "requisition" of the foreign government, and by article 6 such requisition must be made by the "diplomatic agent of the demanding government," and in case of his absence from the seat of government, by the "superior consular officer." It is true that article 7 of the treaty provides that it "shall be lawful for any competent judicial authority of the United States, upon production of a certificate issued by the Secretary of State, stating that request has been made by the Imperial Government of Russia for the provisional arrest of a person convicted or accused of the commission therein of a crime or offense extraditable under this convention, and upon complaint, duly made, that such crime or offense has been so committed, to issue his warrant for the apprehension of such person;" and in this case it appears by the certificate of the acting Secretary of State that application was made in due form by the charge d' affaires of Russia accredited to this Government, for the arrest of Grin, alleged to be a fugitive from the justice of Russia. This, however, was entirely independent of the proceedings before the magistrate, which might have been instituted by any person making a complaint under oath and acting by the permission or authority of the

Russian Government. While article 7 undoubtedly contemplates a prior certificate of the Secretary of State, the language of the article is merely permissive, and does not compel the production of such certificate before the warrant can be issued.

It might readily happen that the foreign representative might have no knowledge of the facts necessary to be embodied in a complaint, and have no documentary evidence then at hand to prove them. In such case if a complaint could not be made by a private person, having knowledge of the facts, the surrender might easily be defeated by the flight of the accused.

It was formerly held that a requisition from the demanding government was necessary to be produced before the commissioner could act (*Re Herris*, 32 Fed. 583), but the opinion in this case was reversed by Mr. Justice Brewer on appeal to the Circuit Court, who held that no preliminary requisition was necessary, as extradition could not be consummated without action by the executive in the last instance, and that the authority of the foreign government to act need not appear in the complaint, if it were made to appear in the examination before the commissioner, or elsewhere in the proceedings. Bearing in mind the frequent necessity for immediate action in case the whereabouts of the accused is ascertained, the delay necessary to procure a preliminary requisition might often result in the defeat of justice.

In *Kaine's Case*, 14 How. 129 (14 L. Ed. 335), this court was nearly equally divided upon the question whether a preliminary mandate from the executive was necessary. So long as Mr. Justice Nelson, who thought such mandate necessary, remained upon the bench his opinion was followed in the second circuit; *In re Heinrich*, 5 Blatch. 414 (Fed. Cas. No. 6,369); *In re Farez*, 7 Blatchf. 34, 345 (Fed. Cas. Nos. 4,644, 4,645); but since that time a different view has been taken of the question. *In re Macdonnell*, 11 Blatchf. 79 (Fed. Cas. No. 8,771); *In re Thomas*, 12 Blatchf. 370 (Fed. Cas. No. 13,887). Judge Lowell's opinion accorded with the later, and, as we think, sounder views. *In re Kelley*, 2 Low. Dec. 339 (Fed. Cas. No. 7,655). See also *Benson v. McMahon*, 127 U. S. 457 (32 L. Ed. 234, 8 Sup. Ct. Rep. 1240).

9. It is again objected that the facts set forth in the record

show that defendant, if guilty at all, is guilty of larceny, and not of embezzlement, and that, as the laws of California make a clear distinction between embezzlement and larceny, he cannot be held for one crime upon proof of his guilt of the other. The charge set forth in the complaint is that Zeefo, one of the members of the firm of E. L. Zeefo & Co., intrusted and delivered a check for the money to Grin, who subsequently received the money from the bank to take it to the Vladikavkaz Railway Company, by which it was to be taken to Novorossesck, and upon the same day absconded. Upon these facts it is insisted that the defendant had nothing more than the bare custody, as distinguished from the possession of the money, and therefore could not and did not embezzle it, but stole it.

By section 503 of the Code of California "embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted," and by section 508, "every clerk, agent, or servant of any person who fraudulently appropriates to his own use . . . any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement." As Grin was clerk of the firm, and as the money was delivered to him in his capacity as clerk for a special purpose, it certainly came into his control or care. We do not care to inquire into the soundness of the distinction made in some of the older cases between the custody and possession of property, because under the section above quoted nothing more is necessary to constitute embezzlement than that the party charged should have the control or care of the money.

The cases in California upon this subject are decisive. Thus, in *Ex parte Hedley*, 31 Cal. 108, where the agent of an express company, authorized to draw telegraphic checks on his principal for money to be used in the principal's business, but not to draw individual checks, drew certain checks as agent for money to be used in his private business, and the principal paid the money to the drawee, it was held to amount to a receipt of the money of the principal by the agent "in the course of his employment." It was further held that, in order to convict one of embezzling money of his principal, it was necessary to establish four propositions: First, that the accused was an agent; sec-

ond, that he received money belonging to his principal; third, that he received it in the course of his employment; fourth, that he converted it to his own use with intent to steal the same. In *People v. Tomlinson*, 102 Cal. 19 (36 Pac. 506), a recent case upon the same subject, the law of California was summed up as follows: "Where one honestly receives the possession of goods upon a trust, and after receiving them fraudulently converts them to his own use, it is a case of embezzlement; . . . but where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny."

These cases are strictly in line with that of *Moore v. United States*, 160 U. S. 268 (40 L. ed. 422, 16 Sup. Ct. Rep. 294), in which we held that "embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted, or into whose hands it has lawfully come; and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of taking."

The cases relied upon by the petitioner are of the latter description. Thus, in *People v. Abbott*, 53 Cal. 284 (31 Am. Rep. 59), defendant was instructed by a bank to purchase silver for its account; and, to provide him with funds, the bank certified and delivered him a check drawn by him on the bank. He did not purchase the silver, but used the check for his own purposes. It was held that, if he took the custody of the certified check with the intention of stealing it, he was guilty of larceny. The question was treated as one for the jury. In *People v. Raschke*, 73 Cal. 378 (15 Pac. Rep. 13), it was held that if one, through false representations, obtains the possession of personal property with the consent of the owner, but without a change of the general title, he is guilty of larceny, upon subsequently converting the same to his own use, if he had the felonious intent to steal the property at the time the possession was obtained. The authority of these cases is not questioned. In the case under consideration, a check was delivered to the petitioner with instructions to draw the money from the bank,



take it to the railway station, to be forwarded to another city. The facts show that he obtained possession of both the check and the money, honestly, and with the consent of his principal, and subsequently converted it to his own use. *Prima facie*, at least, this makes a case of embezzlement, and if there were in fact an original intent to steal, that is a question for a jury in a Russian court to pass upon. It is sufficient for the purposes of this proceeding that a *prima facie* case of embezzlement is made out.

This disposes of all the questions made in the brief, and the judgment of the Circuit Court is affirmed.

NOTE.—See note to last preceding case, as to sufficiency of complaint.

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PEOPLE ex rel. WEGENER v. MAGERSTADT et al.

34 Chi. Legal News, 194—17 Chi. Law. J. 105.

February, 1902.

EXTRADITION: \* *Habeas corpus*—Affidavit before a municipal judge insufficient basis—Extradition not a debt collecting process—Good faith a necessary requisite.

1. The production of a copy of an affidavit made before a municipal judge, there being nothing to show that a municipal judge has criminal jurisdiction, is not a compliance with the act of Congress, that requires a copy of an indictment found or affidavit before a magistrate, charging a crime, as a basis for a requisition.
2. Extradition laws are not created for the collection of debts, or for the gratification of personal malice.
3. "In every extradition case the question of the good faith of the prosecution is always open to inquiry on *habeas corpus*."
4. The facts in this case indicate a lack of good faith.

Criminal Court of Cook County.

Petition for writ of *habeas corpus* to release Gabriel S. Wegener from detention on an extradition warrant. Relator discharged.

The requisition contained the following: "Whereas, it ap-

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\*See EXTRADITION in Table of Topics.



pears by the annexed paper, which I certify to be authentic, that Gabriel S. Wegener . . . stands charged by affidavit with the crime of securing money by false pretenses.

W. M. McEwen, for relator.

Carnahan, Slusser and Hawkes, contra.

GIBBONS, J. In a *habeas corpus* case, where the petitioner is held on an extradition warrant, there are certain limitations upon the power of the court or judge granting the writ; but an examination of the authorities will show that such limitations arise only in cases which come directly within the extradition clause of the Federal Constitution and act of Congress passed in conformity therewith. The act of Congress provides that the executive authority of the demanding State, in addition to making the demand must "produce a copy of an indictment found, or an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded with having committed treason, felony or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged fled."

The demand; or requisition of the Governor of Wisconsin, in this case, is not based on an indictment found, or an affidavit made before a magistrate, but is based on what purports to be an affidavit of David Drummond, made before one J. C. Gilbertson, municipal judge of the City of Eau Claire.

It is duly certified by the clerk of the Circuit Court of Eau Claire County, that J. C. Gilbertson is the duly elected, qualified and acting municipal judge of the City of Eau Claire, but it is nowhere made to appear that the municipal court of Eau Claire, as such, or the judge thereof, has any power to act as magistrate or to take cognizance of criminal cases.

The Probate and County Courts of Cook County are of a higher grade than the municipal court of Eau Claire, because they are courts of record, but they have no criminal jurisdiction. An affidavit made before either of these courts charging a person with a criminal offense, would confer no jurisdiction upon the Governor of Illinois, under the act of Congress, and a certificate of the Governor that the papers were authentic, etc., would

be a nullity. If we might indulge in presumptions in a case where the liberty of a citizen is at stake, we might well presume that the judge of the municipal court of Eau Claire had power to administer an oath, a like presumption might be indulged had the affidavit been made before a notary public. No one would claim that an affidavit made before a notary would confer any authority on the Governor. So that if we admit the power of the municipal judge to administer an oath, it would not help the case.

The power of the Governor of a State, like that of every other official, is defined and limited by law. No man is above the law—or beyond it.

In cases of this nature the demand or requisition of the Governor of the demanding State must be based upon an indictment found, or an affidavit made before a magistrate. Nothing else will suffice, as has been held in Ohio by three United States judges, in an extradition—*habeas corpus* case. I do not remember the title of the case, and I mention it only to show that if a precedent were needed in support of my position, one may be found.

If this were the only point decisive of the case, it would be proper to give the attorneys for the State of Wisconsin a chance to be heard thereon, as it was not raised at the hearing or in the briefs. But as there is another question which is decisive of the case, and which has been fully discussed, it is unnecessary to postpone a decision therein.

In every extradition case the question of the good faith of the prosecution is always open to inquiry on *habeas corpus*. The reason is obvious. The extradition clause of the Federal Constitution was designed to be in the nature of a treaty by each State and Territory with every other State and Territory of the United States, which was to be enforced only as a sovereign remedy, to redress a public grievance.

It never was intended that the act of Congress, passed to carry out this provision of the Constitution, should be used to set in motion the machinery of the executive departments of two States at the instance of a private person, to enable such person to gratify his malice, or to aid him in enforcing the collection of a debt. It was exactly three years from the time the trans-

action occurred which gave rise to this prosecution, before the prosecuting witness made the affidavit that Wegener had deceived him in respect to the sale of five barrels of borax. And about eighteen months after the transaction, the firm of which the prosecuting witness is a member, commenced suit in the United States Court at Omaha, Nebraska, against Wegener and others to recover damages on the ground of the alleged inferiority of the borax in question. These and other facts convince me that this prosecution was instituted to aid in enforcing the collection of a debt.

Chicago is the trade center of this continent and her thousands of business men and commercial solicitors, who visit every town and hamlet of the land in quest of trade, are indirectly interested in this suit, because: If Wegener may be taken to Wisconsin and there prosecuted for a public offense, on account of the facts appearing before me in this case, it will be unsafe for an Illinois man to go beyond the boundaries of his own State to sell his wares or commodities. In my opinion the extradition warrant in this case should be revoked and the petitioner discharged.

NOTE (by J. F. G.).—It is due to the judge to say that the failure to cite authorities was due to the fact, that after the argument he was, on account of poor health, obliged to take a vacation, and wrote the opinion at a point where law books were scarce. The opinion was sent back and the order entered by another judge.

In deciding the case he probably had in mind *Ex parte Hart*, reviewed on pages 308, 309 and 310, of 10 American Criminal Reports, when he was the editor.

In that case the United States Circuit Court of Appeals held, that although each State may regulate its own practice and substitute the use of informations for indictment, that to entitle it to the benefits of the extradition laws, the act of Congress must be complied with; and that no extradition should be granted unless the requisition was accompanied by a copy of an indictment found, or affidavit made before a magistrate, charging a crime.

*Grin v. Shine*, in the present volume, sustains the holding that extradition proceedings should not be used for private ends.

Courts do not take judicial notice of the statutes of sister States.—*Tinkler v. Cox*, 68 Ill. 119. At common law, "securing money by false pretences," was not a crime. Should not the requisition have affirmatively shown it to be a statutory crime in the demanding State? Again, what meaning is to be attached to the word "securing?" Does the charge imply obtaining money by false pretences?

## WRIGHT V. HENKEL.

190 U. S. 40—23 Sup. Ct. Rep. 781—47 L. Ed. 948.

Decided June 1, 1903.

EXTRADITION:\* *Habeas corpus—Interpretation of treaties—Crime recognized by both countries.*

1. By a writ of *habeas corpus* the jurisdiction of the committing magistrate in an international extradition proceeding, can be inquired into; but not minor errors.
2. "Treaties must receive a fair interpretation, according to the intention of the contracting parties; and so as to carry out a manifest purpose."
3. In a treaty between the United States and a foreign power, a provision for the extradition of fugitives from justice, for certain offenses declared crimes by both contracting parties, is not limited to crimes against the United States; but may extend to acts recognized as a crime by the State in which the fugitive has sought an asylum.
4. While the court is unwilling to hold, that in international extradition, the Circuit Court has no power to admit the prisoner to bail, yet in ordinary cases, bail should be denied. In the present instance the Circuit Court did not err in denying bail, even though done on the theory that it lacked the power to allow bail.

Appeal from the Circuit Court of the United States for the Southern District of New York, from an order denying a discharge upon a writ of *habeas corpus*. Argued in the Supreme Court April 28 and 29, 1903. Affirmed.

Statement by Mr. Chief Justice Fuller:

Whitaker Wright applied to the Circuit Court of the United States for the Southern District of New York for writs of *habeas corpus* and *certiorari* on March 20, 1903, by a petition which alleged:

(1) That he was a citizen of the United States, restrained of his liberty by the marshal of the United States for the Southern District of New York, by virtue of a warrant dated March 16, 1903, issued by Thomas Alexander, "United States Commissioner for the Southern District of New York, and commissioner duly authorized by the District Court of the United States for the Southern District of New York, and also commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign

\*See EXTRADITION in Table of Topics.

government under a treaty or convention between this and any foreign government," which warrant was couched in these terms:

"Whereas, complaint has been made on oath under the treaty between the United States and Her Majesty, the late Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12, 1889, before me, Thomas Alexander, one of the commissioners appointed by the District Court of the United States for the Southern District of New York, and also commissioner especially appointed to execute the acts of Congress, entitled 'An Act for Giving Effect to Certain Treaty Stipulations Between This and Foreign Governments for the Apprehension and Delivering up of Certain Offenders,' approved August 12, 1848, and of the several acts amendatory thereof, that one Whitaker Wright did heretofore, during the month of October, in the year 1899, and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore, in the month of October, in the year 1899, and in the month of December, 1900, at the city of London aforesaid, then being a director of a certain body corporate, to wit, the London & Globe Finance Corporation, unlawfully make, circulate, and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; that the said Whitaker Wright is a fugitive from justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States; that the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offense within the treaty between the United States and Great Britain."

(2) That the warrant was issued on a complaint by His Britannic Majesty's consul general at the port of New York, as follows:

"First. That one Whitaker Wright did heretofore and in the month of December, 1900, in the city of London, in that part

of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore and in the month of October, in the year 1899, and in the month of December, 1900, at the city of London, aforesaid, then being a director of a certain body corporate, to wit, the London & Globe Finance Corporation, unlawfully make, circulate, and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright, then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation.

"Second. That the said Whitaker Wright is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States.

"Third. That the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offense within the treaty between the United States and Great Britain.

"Fourth. That deponent's information and belief are based upon messages received by cable from his Majesty's Secretary of State for Foreign Affairs, one of the said messages stating that a warrant had been issued in England for the apprehension of the said Whitaker Wright for the offense herein charged and directing deponent to apply for a provisional warrant, under the treaty for extradition, between the United States and Great Britain.

"That deponent has, since the apprehension of the said Whitaker Wright yesterday, cabled to His Majesty's said foreign secretary for fuller details as to said crime, and an answer is directly expected, but that the said Whitaker Wright may be detained, pending the arrival of such information, deponent asks for a provisional warrant herein."

(3.) "That the aforesaid complaint states no facts which create jurisdiction for the issuance of the aforesaid warrant, and for the detention of your petitioner; that it does not state any facts which show that your petitioner has been guilty of any offense within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland."

(4.) That he had duly objected to the continuance of any



proceedings under the complaint and warrant, on the ground that the commissioner had no jurisdiction; but his objections had been overruled, and the commissioner had adjourned the proceedings until March 30, 1903.

(5.) That on March 18, 1903, he presented to the commissioner an application to be admitted to bail pending the proceeding, and, in support of the application, filed with the commissioner the affidavit of his attending physician, which was to the effect that petitioner was suffering from bronchitis and a severe chill, which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment; but that the commissioner denied the application on the ground that no power existed for admitting petitioner to bail; (6) that the cause of imprisonment was the charge and the refusal to admit to bail.

(7) That the imprisonment and detention were illegal, and the warrant void, the complaint stating no jurisdictional facts to warrant imprisonment and detention. That the denial of the right to give bail constitutes a violation of the 8th Amendment of the Constitution, and section 1015 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 718), and of the common law of the United States, and constitutes a deprivation of liberty without due process of law.

The writs prayed for were granted, and, after hearing, dismissed and the application to be admitted to bail denied, March 30, the opinion being filed March 25, and copy of final order served March 28. — Fed. Rep. —. The case was then brought to this court by appeal.

At the argument it was made to appear that, on March 31, His Majesty's consul general at New York made a new complaint, which reiterated the original charge, with some amplification, and added that Wright "did also, at the times and places aforesaid, then being a director and manager of said company or corporation aforesaid, with intent to defraud, alter and falsify books, papers, and writings belonging to the said company or corporation, and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said company or corporation; and did also, at the times and places aforesaid, then being a director of the said company or



corporation as aforesaid, alter and falsify books, papers, and writing, and made and was privy to the making of false and fraudulent entries in the books of account and other documents belonging to the said company or corporation, with intent to defraud and deceive shareholders and creditors of said company or corporation, and other persons."

It was further stated: "That deponent's information and belief are based upon a certified copy of a warrant issued by one of his Majesty's justices of the peace for the city of London, for the apprehension of the said Whitaker Wright, for the offense herein first enumerated, and a certified copy of the information and complaint of the senior official receiver in companies liquidation (acting under the order of the high court of justice) and the depositions of Arthur Russell and John Flower, in support thereof, upon the application for a summons against the said Whitaker Wright, and the depositions of George Jarman and Harry Gerald Abrahams, on which information and complaint and depositions the said warrant was granted for the apprehension of the said Whitaker Wright," etc. Copies of these papers accompanied the complaint, and reference was made to cable messages from the Secretary of State for Foreign Affairs.

On this complaint a warrant was issued and the accused arraigned before the commissioner, and it was thereupon stated that the demanding government would abandon all further proceedings under the complaint of March 16, and consented to the discharge of the prisoner from the arrest thereof. The commissioner held that, as the proceedings under the previous warrant had been carried into the Circuit Court, he was without power to discharge the prisoner under that warrant. Subsequently, the order of the Circuit Court dismissing the writs of *habeas corpus* and *certiorari*, and remanding the prisoner, was brought to the commissioner's attention, but consul for the prisoner stated that papers were being prepared for the purpose of removing the case to the Supreme Court. The commissioner ruled that, pending such proceedings, he must decline to dismiss the complaint and discharge the prisoner.

Article 10 of the treaty of 1842 (8 Stat. at L. 572, 576), reads as follows:

"It is agreed that the United States and Her Britannic Ma-

jeaty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be born and defrayed by the party who makes the requisition, and receives the fugitive."

Article 1 of the treaty of 1889 (26 Stat. at L. 1508), is:

"The provisions of the said 10th article are hereby made applicable to the following additional crimes:

"1. Manslaughter, when voluntary.

"2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

"5. Perjury, or subornation of perjury.

"6. Rape; abduction; child-stealing; kid-napping.

"7. Burglary; house-breaking or shop-breaking.

"8. Piracy of the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

"10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries."

Sections 83 and 84 of chapter 96, 24 and 25 Victoria, are as follows:

83. "Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

84. "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

Section 75 provided for a liability, on conviction of the misdemeanor therein mentioned, "at the discretion of the court, to

be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Section 166 of the Companies Act of 1862, 25 and 26 Vict., chap. 89, provides:

"If any director, officer, or contributory of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company, with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and, upon being convicted, shall be liable to imprisonment for any term not exceeding two years, with or without hard labor."

Section 514 and subdivision 3 of section 611 of the New York Penal Code read as follows:

"Sec. 514. *Other cases of forgery in the third degree.*—A person who either (1) being an officer or in the employment of a corporation, association, partnership, or individuals, falsifies, or unlawfully and corruptly alters, erases, obliterates, or destroys any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association, partnership, or individuals; . . . is guilty of forgery in the third degree."

"Sec. 611. *Misconduct of officers and employees of corporations.*—A director, officer, agent, or employee of any corporation or joint stock association who: . . . (3) knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false; . . . is guilty of a misdemeanor."

Section 525 provides: "Forgery in the third degree is punishable by imprisonment for not more than five years."

By section 15 it is provided:

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a

penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

By the extradition act of Great Britain of 1870, 33 and 34 Vict., chap. 52, it is provided that: "A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender." The accused is, on committal, to be informed of this, and "that he has a right to apply for a writ of *habeas corpus*." If he is not surrendered and conveyed out of the United Kingdom "within two months after such committal, or, if a writ of *habeas corpus* is issued, after the decision of the court on the return to the writ, it shall be lawful for any judge of Her Majesty's superior courts at Westminster," on notice, to order him to be discharged, unless sufficient cause is shown to the contrary.

The first schedule contained a list of crimes, which includes: "Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company, made criminal by any act for the time being in force."

By section 5273 of the Revised Statutes, Title 66, *Extradition* (U. S. Comp. 1901, p. 3596), it is provided that whenever any person committed under the title or any treaty "to remain until delivered up in pursuance of a requisition," is not so delivered up and conveyed out of the United States within two calendar months after such commitment, he may be discharged by any judge of the United States or of any State, on notice, unless sufficient cause is shown to the contrary.

Section 5270 (U. S. Comp. Stat. 1901, p. 3591), is as follows:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District, or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the

apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

Messrs. *Samuel Untermeyer* and *Louis Marshall*, for the appellant.

Mr. *Charles Fox*, for appellees.

Solicitor General *Hoyt*, and Mr. *Milton D. Purdy*, for United States.

Mr. Chief Justice Fuller delivered the opinion of the court:

The writ of *habeas corpus* cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings (*Ornelas v. Ruiz*, 161 U. S. 502 (40 L. ed. 787, 16 Sup. Ct. Rep. 689); *Terlinden v. Ames*, 184 U. S. 270 (46 L. ed. 534, 22 Sup. Ct. Rep. 484, 12 Am. Cr. R. 424); and it was on the ground of want of jurisdiction that the writ was applied for in this instance before the commissioner had entered upon the examination; as also on the ground that petitioner should have been admitted to bail.

The contention is that the complaint and warrant did not charge an extraditable offense within the meaning of the extradition treaties between the United States and the United Kingdom of Great Britain and Ireland, because the offense was not criminal at common law, or by acts of Congress, or by the preponderance of the statutes of the States.

Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal pro-



ceedings are applicable in proceedings in extradition only to a limited extent. *Grin v. Shine*, 187 U. S. 181 (12 Am. Crim. R. 366, 23 Sup. Ct. Rep. 98); *Tucker v. Alexandroff*, 183 U. S. 424 (46 L. ed. 264, 22 Sup. Ct. Rep. 195).

The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and, as to the offense charged in this case, the treaty of 1889 embodies that principle in terms. The offense must be "made criminal by the laws of both countries."

We think it cannot be reasonably open to question that the offense under the British statute is also a crime under the third paragraph of section 611 of the Penal Code of New York, brought forward from section 603 of the Code of 1882. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or officer of any company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating, or publishing, with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager, or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent; but, even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.

It may be remarked that the statutes of several other States agree with that of New York on this subject; and that sections 73 and 74 of the act of Congress to define and punish crimes in the District of Alaska, 30 Stat. at L. 1253, chap. 429, and section 5209 of the Revised Statutes (U. S. Comp. Stats. 1901, p. 3497), in respect of the officers of National Banks, are largely to the same effect as the English statute.



As the State of New York was the place where the accused was found and, in legal effect, the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of both countries," to be interpreted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the States? That view would largely defeat the object of our extradition treaties by ignoring the fact that, for nearly all crimes and misdemeanors, the laws of the States, and not the enactments of Congress, must be looked to for the definition of the offense. There are no common law crimes of the United States; and, indeed, in most of the States the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson v. McMahon*, 127 U. S. 457 (32 L. ed. 234, 8 Sup. Ct. Rep. 1240).

In July, 1844, Attorney General Nelson advised the Secretary of State, then Mr. Calhoun, that "cases, as they occur, necessarily depend upon the laws of the several States in which the fugitive may be arrested or found;" and in December of that year, Mr. Calhoun wrote to the French minister: "What evidence is necessary to authorize an arrest and commitment depends upon the laws of the State or place where the criminal may be found." Moore, *Extradition*, § 344; *United States v. Warr*, 3 N. Y. Legal Obs. 346, Fed. Cas. No. 16,644.

So, Mr. Secretary Fish, in November, 1873, in replying to certain specified questions of the minister of the Netherlands, among other things, said: "That, in every treaty of extradition, the United States insists that it can be required to surrender a fugitive criminal only upon such evidence of criminality as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed;" and "that the criminal code of the United States applies only to offenses defined by the general government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each State establishes and regulates its own criminal procedure, as well with respect to the definition of crimes as to the mode of procedure against criminals, and the manner and extent of punishment." Moore, *Extradition*, § 337n.

In *Muller's Case*, 5 Phila. 289, 292, the definition of the of-

fense in the State where the fugitive was found was applied by the District Court for the Eastern District of Pennsylvania, and Judge Cadwalader said:

"In the series of treaties which have been mentioned, certain offenses, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question—though generically forgery wherever criminal—might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the Statute of 1860, and that the case on the part of the Saxon Government had, therefore, been made out.

"There is no jurisprudence or common law of the Government of the United States. . . . No legislation of their government, independently of the jurisprudence and legislation of the several States, can have been expected by those who made the treaties ever to give specific definitions of certain crimes mentioned in them. No such legislation as to forgery of private writings, which is the offense here charged, can have been expected. As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations."

And this language is strikingly applicable to the supplemental treaty of 1889, framed, as it was, by Mr. Secretary Blaine, and that accomplished lawyer and publicist, then Sir Julian Pauncefote, who was thoroughly familiar with the dual system of this Government. Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As, for instance, as to the slave trade; though criminal, yet, apparently because there had been peculiar local aspects, the crime was required to be "against the laws of both countries;" and so as to fraud and breach of trust, which had

been brought within the grasp of criminal law in comparatively recent times. But it is enough if the particular variety was criminal in both jurisdictions, and the laws of both countries included the laws of their component parts.

In *Grin v. Shine* we applied the definition of embezzlement given by the laws of California; but there the petitioner himself appealed to that definition, and the case, though in many respects of value here, did not rule the precise point before us.

But we rule it now, and concur with Judge Lacombe, that when, by the law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that, if the United States were seeking to have a person indicted for this same offense under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offense charged to be within the treaty because the law violated was a statute of one of the States, and not an act of Congress.

It is true that in the case of *Windsor* (1865), 6 Best & S. 522, a contrary view was expressed; but it should be observed that the charge was forgery, and it was held that the facts did not constitute forgery in England, and that the statute of New York defining the offense of forgery in the third degree could not properly be regarded as extending the force of the treaty to offenses not embraced within the definition of forgery at the time when the treaty was executed. So far as the conclusion is expressed by the eminent judges who united in that decision, that the treaty did not comprise offenses made such only by the legislation of particular States of the United States, it did not receive our assent.

The result is that we hold that the commissioner had jurisdiction, and that brings us to consider whether the commissioner or the Circuit Court erred in denying the application to be let to bail.

By section 1015 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 718), it is provided: "Bail shall be admitted upon all arrests in criminal cases where the offense is not punishable by

death; and in such cases it may be taken by any of the persons authorized by the preceding section to arrest and imprison offenders." But this must be read with section 1014, the preceding section, and that is confined to crimes or offenses against the United States. *Rice v. Ames*, 180 U. S. 377 (12 Am. Crim. Rep. 356, 45 L. Ed. 582, 21 Sup. Ct. Rep. 406). These sections were originally contained in one section. Judiciary Act of 1789, 1 Stat. at L. 91, chap. 20, § 33.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but section 5270 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3591), is inconsistent with its allowance after committal, for it is there provided that, if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

And section 5273 (U. S. Comp. Stat. 1901, p. 3596), provides that, when a person is committed "to remain until delivered up in pursuance of a requisition," and is not delivered up within two months, he may be discharged, if sufficient cause to the contrary is not shown.

The demanding Government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other Government is under obligation to make the surrender; an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.

The subject was considered by the District Court of Colorado in the case of *Carrier*, 57 Fed. Rep. 578, and Hallett, J., held that the matter of admitting to bail was not a question of practice; that it was dependent on statute; that although the statute of the United States in respect of procedure in extradition did not forbid bail in such cases, that was not enough, as the

authority must be expressed; and that as there was no provision for bail in the act, bail could not be allowed.

And Judge Lacombe in the present case stated that applications to admit to bail in such cases had, on several occasions, been made to the Circuit Court, and that they had been uniformly denied.

In *Queen v. Spilsbury* [1898], 2 Q. B. 615, it was held that the Queen's Bench had, "independently of statute, by the common law, jurisdiction to admit to bail," but that was a case arising under the Fugitive Offenders Act, and the distinction existing ordinarily between rendition between different parts of Her Majesty's dominions, and cases arising under the Extradition Acts, was pointed out. The court, while ruling that the power to admit to bail existed, held that, as matter of judicial discretion, it ought not to be exercised in that case.

We are unwilling to hold that the Circuit Court possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so, as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

The affirmance of the final order leaves it open to the demanding Government to withdraw the proceeding first initiated, and proceed on the subsequent application, the pendency of which, as called to our attention, we do not think required us to dismiss this appeal.

*Order affirmed.*

NOTE (by J. F. G.).—Closely allied to *Wright v. Henkel* is the case of *Pettit v. Walshe*, 194 U. S. 205, 24 Sup. Ct. Rep. 657, 48 L. Ed. 938, decided May 2, 1904. Walshe was arrested in Indiana by a United States marshal, upon an international extradition warrant issued by a United States commissioner of New York. Walshe applied to the United States Circuit Court of the District of Indiana for a discharge by a writ of *habeas corpus*. The marshal, in his return to the writ, set out the extradition warrant; and declared his intention to convey

Walshe to the commissioner in the State of New York. The court ordered that Walshe be discharged (125 Fed. Rep. 572), from which order the marshal took an appeal directly to the Supreme Court. The Supreme Court held that the appeal was properly taken; but affirmed the judgment of the Circuit Court on the ground that international extradition proceedings can only be heard within the State the accused is found. The decision not coming within the time limit of this volume, but being one of the constellations of recent important extradition cases, we make the opinion a part of this note as follows:

Mr. Justice Harlan delivered the opinion of the court:

This is a case of extradition. It presents the question whether a commissioner specially appointed by a court of the United States under and in execution of statutes enacted to give effect to treaty stipulations for the apprehension and delivery of offenders, can issue a warrant for the arrest of an alleged criminal, which may be executed by a marshal of the United States, within his district, in a State other than the one in which the commissioner has his office. It also presents the question whether a person arrested under such a warrant can be lawfully taken beyond the State in which he was found, and delivered in another State before the officer who issued the warrant of arrest, without any preliminary examination in the former State as to the criminality of the charge against him.

By the tenth article of the treaty between the United States and Great Britain, concluded August 9, 1842, it was provided that upon mutual requisitions by them, or their ministers, officers or authorities, respectively made, they shall "deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the Territories of the other." But by the same article it was provided that "this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive." 8 Stat. at L. 572, 576.

A supplementary treaty between the same countries, concluded July 12, 1889, provided for the extradition for certain crimes not specified in the tenth article of the treaty of 1842, and "punishable by the laws of both countries;" and, also, declared that the provisions of the above



article "shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed. In case of a fugitive criminal alleged to have been convicted of the crime of which his surrender is asked, a copy of the record of the conviction, and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers." 26 Stat. at L. 1508, 1510.

By an act of Congress, approved August 12, 1848, chapter 167, and entitled "An Act for Giving Effect to Certain Treaty Stipulations Between This and Foreign Governments for the Apprehension and Delivering Up of Certain Offenders," it is provided (§ 1): "That in all cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the government of the United States and any foreign government, it shall and may be lawful for any of the justices of the Supreme Court or judges of the several district courts of the United States—and the judges of the several State courts, and the commissioners *authorized so to do* by any of the courts of the United States, are hereby severally vested with power, jurisdiction and authority, upon complaint made under oath or affirmation, charging any person found within the limits of any State, district or Territory, with having committed within the jurisdiction of any such foreign government any of the crimes enumerated or provided for by any such treaty or convention—to issue his warrant for the apprehension of the person so charged, that he may be brought before such judge or commissioner, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient by him to sustain the charge under the provisions of the proper treaty or convention, it shall be his duty to certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of said treaty or convention; and it shall be the duty of the said judge or commissioner to issue his warrant for the commitment of the person so charged to the proper gaol, there to remain until such surrender shall be made." "§ 6. That it shall be lawful for the courts of the United States, or any of them, *to authorize any person or persons to act as a commissioner or commissioners*, under the provisions of this act; and the doings of such person or persons so authorized, in pursuance of any of the provisions aforesaid, shall be good and available to all intents and purposes whatever." 9 Stat. at L. 302.

And by section 5270, of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3591)—omitting therefrom the proviso added thereto by the act of June 6, 1900, chapter 793, 31 Stat. at L. 656 (U. S. Comp. Stat. 1901, p. 3591), which applies only to crimes committed in a foreign country or territory "occupied by or under the control of the United States"—it is provided: "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge,



commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, district or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." See, also, § 5273 (U. S. Comp. Stat. 1901, p. 3596).

In the sundry civil appropriation act of August 18, 1894, will be found the following clause: "*Provided*, that it shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest Circuit Court Commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment or taking bail for trial, and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused, the return of the warrant, with a copy of the complaint attached, shall confer jurisdiction upon such officer as fully as if the complaint had originally been made before him, and no mileage shall be allowed any officer violating the provisions hereof." 28 Stat. at L. 416, chapter 301 (U. S. Comp. Stat. 1901, p. 717).

Under these treaty and statutory provisions, complaint on oath was made before John A. Shields—a commissioner appointed by the District Court of the United States for the Southern District of New York to execute the above act of August 12, 1848, and the several acts amendatory thereof—that one James Lynchehaun was convicted, in a court of Great Britain, of the crime of having feloniously and unlawfully wounded one Agnes McDonnell, with intent thereby, feloniously and with malice aforethought, to kill and murder said McDonnell; that the accused was sentenced to be kept in penal servitude for his natural life; that in execution of such sentence he was committed to a convict prison in Queens County, Ireland, had escaped therefrom, and was at large; and that he was a fugitive from the justice of the Kingdom of Great Britain and Ireland, and within the territory of the United States. It is admitted that the present appellee is the person referred to in the warrant as James Lynchehaun.

Upon that complaint, Commissioner Shields, in his capacity as a commissioner appointed by a court of the United States, to execute the laws relating to the extradition of fugitives from the justice of foreign countries, issued, on the 6th day of June, 1903, in the name of

the President, a warrant addressed "to any marshal of the United States, to the deputies of any such marshal, or any or either of them," commanding that the accused be forthwith taken and brought before him, *at his office, in the city of New York*, in order that the evidence as to his criminality be heard and considered, and if deemed sufficient to sustain the charge, that the same might be certified, together with a copy of all the proceedings, to the Secretary of State, in order that a warrant might be issued for the surrender of the accused, pursuant to the above treaty.

This warrant having been placed for execution in the hands of the appellant, as marshal of the United States for the District of Indiana, he arrested the accused in that State. Thereupon the latter filed his application for a writ of *habeas corpus* in the Circuit Court of the United States for that District, alleging that his detention was in violation of the Constitution, treaties and laws of the United States. The writ was issued, and the marshal justified his action under the warrant, issued by Commissioner Shields. Referring to the warrant and averring its due service upon the accused, the marshal's return stated that the warrant was "regular, legal, valid and sufficient in law in all respects to legally justify and warrant the arrest and detention of petitioner, and, under the laws of the United States, it was and is the duty of this defendant to arrest and detain said petitioner, and deliver him as commanded by said writ for hearing before Commissioner Shields, in New York city; that said writ runs for service in the State of Indiana, although issued by a commissioner of the United States for the Southern District of New York, by reason of its being a writ in extradition; that defendant is informed and believes, and therefore states the fact to be, that petitioner is the identical person commanded to be arrested by said warrant as James Lynchehaun; . . . and that it is by virtue and authority solely of said warrant that defendant holds and detains petitioner; that defendant proposes, if not otherwise ordered by this Honorable Court, to obey, as United States marshal for the District of Indiana, the command of said warrant as set out therein, believing it to be his duty as said officer so to do."

The accused excepted to the marshal's return for insufficiency in law, and the case was heard upon that exception. The court held the return to be insufficient; and the marshal having indicated his purpose not to amend it, the accused was discharged upon the ground that the commissioner in New York was without power to issue a warrant under which the marshal for the District of Indiana could legally arrest the accused and deliver him before the court of that commissioner in New York without a previous examination before some proper officer in the State where he was found. *Re Walshe*, 125 Fed. Rep. 572.

The appellee contends that this case only involves a construction of certain acts of Congress, and that, therefore, this court is without jurisdiction to review the judgment on direct appeal from the Circuit Court. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 407, 24 Sup. Ct. Rep. 376. We do not concur in this view. The treaties of 1842 and 1889 are at the basis of this litigation, and no effective decision can be made of the controlling questions arising upon the appeal without

an examination of those treaties, and a determination of the meaning and scope of some of their provisions. A case may be brought directly from a Circuit Court to this court if the construction of a treaty is therein drawn in question. 26 Stat. at L. 826, chapter 517, § 5 (U. S. Comp. Stat. 1901, p. 549). The petition for the writ of *habeas corpus* and the warrant under which the accused was arrested, both refer to the treaty of 1842, and the court below properly, we think, proceeded on the ground that the determination of the questions involved in the case depended in part, at least, on the meaning of certain provisions of that treaty. The construction of the treaties was none the less drawn in question because it became necessary or appropriate for the court below also to construe the acts of Congress passed to carry their provisions into effect.

We now go to the merits of the case. It has been seen that the treaty of 1842 expressly provides, among other things, that a person charged with the crime of murder, committed within the jurisdiction of either country, and found within the territories of the other, shall be delivered up by the latter country; and that the provision shall apply in the case of one convicted of such a crime, but whose sentence has not been executed. But both countries stipulated in the treaty of 1842 that the alleged criminal shall be arrested and delivered up *only* upon such evidence of criminality, as, according to the laws of the place where the fugitive person so charged is found, would justify his apprehension and commitment for trial if the crime or offense had been there committed. As applied to the present case, that stipulation means that the accused, Walshe, could not be extradited under the treaties in question, except upon such evidence of criminality as, under the laws of the State of Indiana,—the place in which he was found,—would justify his apprehension and commitment for trial if the crime alleged had been there committed. The words in the tenth article of the treaty of 1842, "as according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial if the crime or offense had there been committed," and the words "punishable by the laws of both countries," in the treaty of 1889, standing alone, might be construed as referring to this country as a unit, as it exists under the Constitution of the United States. But as there are no common-law crimes of the United States, and as the crime of murder, as such, is not known to the National Government, except in places over which it may exercise exclusive jurisdiction, the better construction of the treaty is, that the required evidence as to the criminality of the charge against the accused must be such as would authorize his apprehension and commitment for trial in that State of the Union in which he is arrested.

It was substantially so held in *Wright v. Henkel*, 190 U. S. 40, 58, 61, 47 L. Ed. 948, 954, 955, 23 Sup. Ct. Rep. 781, 785, 786, which was a case of extradition under the same treaties as those here involved. In that case the alleged fugitive criminal from the justice of Great Britain was found in New York. The court said: "As the State of New York was the place where the accused was found, and, in legal effect, the

asylum to which he had fled, is the language of the treaty, 'made criminal by the laws of both countries,' to be interpreted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the States? That view would largely defeat the object of our extradition treaties by ignoring the fact that for nearly all crimes and misdemeanors the laws of the States, and not the enactments of Congress, must be looked to for the definition of the offense. There are no common-law crimes of the United States, and, indeed, in most of the States the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson v. McMahon*, 127 U. S. 457 (32 L. Ed. 234, 8 Sup. Ct. Rep. 1240)." Again: "When by the law of Great Britain, and by the law of the State in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that if the United States were seeking to have a person indicted for this same offense under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offense charged to be within the treaty because the law violated was a statute of one of the States, and not an act of Congress."

The above provision in the treaty of 1842 has not been modified or superseded by any of the acts passed by Congress to carry its provisions into effect. In our opinion, the evidence of the criminality of the charge must be heard and considered by some judge or magistrate authorized by the acts of Congress to act in extradition matters, and sitting in the State where the accused was found and arrested. Under any other interpretation of the statute Commissioner Shields, proceeding under the treaty, could by his warrant cause a person charged with one of the extraditable crimes, and found in one of the Pacific States, to be brought before him at his office in the city of New York, in order that he might hear and consider the evidence of the criminality of the accused. But as such a harsh construction is not demanded by the words of the treaties or of the statutes, we shall not assume that any such result was contemplated by Congress. While the view just stated has some support in those parts of the act of 1848, and section 5270, of the Revised Statutes, which provide for the accused being brought before the justice, judge or commissioner who issued the warrant of arrest, it is not consistent with the above proviso in the sundry civil act of August 18, 1894, the language of which is broad enough to embrace the case of the arrest by a marshal, within the District for which he was appointed, of a person charged with an extraditable crime committed in the territories of Great Britain, and found in this country. By that proviso it is made the duty of a marshal arresting a person charged with any crime or offense to take him before the nearest Circuit Court Commissioner or the nearest judicial officer, having jurisdiction, for a hearing, commitment or taking bail for trial in cases of extradition. The commissioner or judicial officer here referred to is necessarily one acting as such within the State in which the accused was arrested and found. So that, assuming that it was competent for the marshal for the District of Indiana to execute Com-

missioner Shields' warrant within his district, as we think it was, his duty was to take the accused before the nearest magistrate in that district, who was authorized by the treaties and by the above acts of Congress to hear and consider the evidence of criminality. If such magistrate found that the evidence sustained the charge, then, under section 5270, of the Revised Statutes, it would be his duty to issue his warrant for the commitment of the accused to the proper jail, there to remain until he was surrendered under the direction of the National Government, in accordance with the treaty. Instead of pursuing that course, the marshal arrested Walshe, and in his return to the writ of *habeas corpus* distinctly avowed his purpose, unless restrained by the court, to take the prisoner at once from the State in which he was found, and deliver him in New York, before Commissioner Shields, without a hearing first had in the State of Indiana before some authorized officer or magistrate there sitting, as to the evidence of the criminality of the accused. The Circuit Court adjudged that the marshal had no authority to hold the accused in custody for any such purpose; and, the marshal declining to amend his return, and not avowing his intention to take him before a judicial officer or magistrate in Indiana for purposes of hearing the evidence of criminality, the prisoner was properly discharged from the custody of that officer.

For the reasons above stated the judgment is affirmed.

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NEELY V. HENKEL.

180 U. S. 126—21 Sup. Ct. Rep. 302—45 L. Ed. 448, 32 Chi. L. N. 197.

Decided January 14, 1881.

EXTRADITION: \* *Status of Cuba during the transition period.*

1. The object of the war with Spain was to abate the "abhorant conditions" then existing in Cuba, to give freedom to the Cubans, and to assist them in establishing a stable form of government; but not for either conquest, or alliance with, or recognition of, the then existing Republic of Cuba.
2. Upon a withdrawal of Spanish authority, Cuba passed into the control of the United States, not as ceded or conquered territory, but as a foreign country, under a protectorate, while it was being formed into an organized nation.
3. After the cessation of hostilities, as between the United States and all foreign nations, Cuba was to be treated as territory acquired by conquest; but as between the United States and Cuba, the island was held in trust for its inhabitants, to be delivered to them, as soon as they had voluntarily established a stable government.

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\*See EXTRADITION in Table of Topics.

4. The military government in Cuba established by the United States and administered by officers appointed by the United States, constituted, as between the United States and Cuba, a foreign government.
5. How long this temporary control should continue is a matter properly resting with the political branch of the government.
6. The successors to Spanish rule in Cuba became "the public," to which the unrepealed code remained as law.
7. The act of June 6, 1900, providing for the extradition of any criminal fleeing to the United States, from any foreign country or territory, occupied or controlled, in whole or in part, by the United States, is consistent with the Constitution of the United States; and applied to Cuba during the transition period.
8. Judicial notice is taken of the relation between this country and Cuba; and of the dates connected therewith.

Appeal from the Circuit Court of the United States for the Southern District of New York from a decision denying discharge upon a writ of *habeas corpus* (103 Fed. Rep. 631). Argued before the Supreme Court December 10 and 11, 1900. Affirmed.

Messrs. *John D. Lindsay* and *De Lancey Nicoll*, for the appellant.

*Assistant Attorney General Beck*, for the appellee.

Mr. Justice Harlan delivered the opinion of the court:

By section 5270 of the Revised Statutes of the United States it is provided:

"Whenever there is a *treaty or convention for extradition* between the Government of the United States and any *foreign* Government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within the limits of any State, District, or Territory with having committed within the jurisdiction of any such foreign Government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the



charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign Government for the surrender of such person according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

This section was amended by Congress June 6, 1900, by adding thereto the following proviso:

*"Provided, That whenever any foreign country or territory, or any part thereof, is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: Murder, and assault with intent to commit murder; counterfeiting or altering money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value, burglary, defined to be the breaking and entering by night-time into the house of another person with intent to commit a felony therein, and the act of breaking and entering the house or building of another, whether in the day or night-time, with the intent to commit a felony therein; the act of entering or of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking houses, savings banks, trust companies, insurance, or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States or of some other Government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwell-*



ings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, or to any Territory thereof, or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military Governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered, as hereinafter provided, to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, That such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged: *And provided further*, That no return or surrender shall be made of any person charged with the commission of an offense of a political nature. If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such person a fair and impartial trial." 31 Stat. at L. 656, chap. 793.

On the 28th day of June, 1900, a warrant was issued by Judge Lacombe of the Circuit Court of the United States for the Southern District of New York commanding the arrest of Charles F. W. Neely, who, "being then and there a public employee, to wit, finance agent of the department of posts in the city of Havana, island of Cuba, on the 6th day of May in the year of our Lord one thousand nine hundred, or about that time, having then and there charge of the collection and deposit of moneys of the department of posts of the said city of Havana, did unlawfully and feloniously take and embezzle from the public funds of the said island of Cuba the sum of \$10,000 and more, being then and there moneys and funds which had come into his charge and under his control in his capacity as such public employee and finance agent, as aforesaid, and by reason of his said office and employment, thereby violating chapter 10,

art. 401, of the Penal Code of the said island of Cuba—that is to say, a crime within the meaning of the said act of Congress approved June 6, 1900, as aforesaid, relating to the ‘embezzlement or criminal malversation of the public funds committed by public officers, employees, or depositaries.’ ” The warrant directed the accused to be brought before the judge in order that the evidence of probable cause as to his guilt could be heard and considered, and, if deemed sufficient, that the same might be certified, with a copy of all the proceedings, to the Secretary of State, that an order might issue for his return and surrender pursuant to the authority of the above act of Congress.

The warrant of arrest was based on a verified written complaint of an assistant United States attorney for the Southern District of New York.

On the same day and upon a like complaint a warrant was issued against Neely by the same judge, commanding his arrest for the crime of having unlawfully and fraudulently, while employed in and connected with the business and operations of a branch of the service of the department of posts in Havana, Cuba, between July 1, 1899, and May 1, 1900, embezzled and converted to his own use postage stamps, moneys, funds, and property belonging to and in the custody of that department, which had come into his custody and under his authority as such employee, to the amount of \$57,000, in violation of sections 37 and 55 of the Postal Code of Cuba.

Neely having been arrested under these warrants, application was made by the United States for its extradition to Cuba. The accused moved to dismiss the complaints upon various grounds. That motion having been denied, the case was heard upon evidence. In disposing of the application for extradition, Judge Lacombe said: “In the opinion of this court, the Government has abundantly shown that there is probable cause to believe that Neely is guilty of the offense of ‘embezzlement or criminal malversation of the public funds,’ he being at the time a ‘public officer,’ or ‘employee,’ or ‘depository.’ Such an offense is obnoxious to the Penal Code in force in Cuba, article 401 of which provides that ‘the public employee who, by reason of his office, has in his charge public funds or property, and who should take

(or consent that others should take) any part therefrom, shall be punished,' etc. There is no merit in the contention that this article applies only to persons in the public employ of Spain. Spain having withdrawn from the island, its successor has become the 'public' to which the Code, remaining unrepealed, now refers. The suggestion that under this Penal Code no public employee could be prosecuted or punished until his superior had heard the case and turned the offender over to the criminal law for trial is matter of defense, and need not be considered here. The evidence shows probable cause to believe that the prisoner is guilty of an offense defined in the act of June 6, 1900, and which is also a violation of the criminal laws in Cuba, and upon such evidence he will be held for extradition." But it was further said: "Two obstacles . . . now exist. He [the accused] has been held to bail in this court upon a criminal charge of bringing into this district Government funds embezzled in another district. He has also been arrested in a civil action brought in this court to recover \$45,000, which, it is alleged, he has converted. When both of these proceedings have been discontinued the order in extradition will be signed. This may be done on August 13th at 11 A. M."

Subsequently, August 9, 1900, Neely presented in the court below his written application for a writ of *habeas corpus*, and prayed that he be discharged from restraint in the extradition proceedings. He claimed on various grounds that the act of June 6, 1900, under which he was arrested, detained, and imprisoned was in violation of the Constitution of the United States.

The application for the writ of *habeas corpus* having been denied, and an appeal having been duly taken, the petitioner was remanded to the custody of the marshal to await the determination of such appeal in this court.

1. That at the date of the act of June 6, 1900, the island of Cuba was "occupied by" and was "under the control of the United States," and that it is still so occupied and controlled, cannot be disputed. This court will take judicial notice that such were, at the date named and are now, the relations between this country and Cuba. So that the applicability of the above.

act to the present case—and this is the first question to be examined—depends upon the inquiry whether, within its meaning, Cuba is to be deemed a *foreign* country or territory.

We do not think this question at all difficult of solution if regard be had to the avowed objects intended to be accomplished by the war with Spain and by the military occupation of that Island. Let us see what were those objects as they are disclosed by official documents and by the public acts of the representatives of the United States.

On the 20th day of April, 1898, Congress passed a joint resolution, the preamble of which recited that the abhorrent conditions existing for more than three years in the island of Cuba, so near our own borders, had shocked the moral sense of the people of the United States, had been a disgrace to civilization, culminating in the destruction of a United States battleship with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Havana, and could not longer be endured. It was therefore resolved: "1. That the people of the island of Cuba are, and of right ought to be, free and independent. 2. That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters. 3. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect. 4. That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people." 30 Stat. at L. 738.

The adoption of this joint resolution was followed by the act of April 25, 1898, by which Congress declared: "1. That war be, and the same is, hereby declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of

Spain. 2. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States to such extent as may be necessary to carry this act into effect." 30 Stat. at L. 364, chap. 189.

The war lasted but a few months. The success of the American Arms was so complete and overwhelming that a Protocol of Agreement between the United States and Spain embodying the terms of a basis for the establishment of peace between the two countries was signed at Washington on the 12th day of August, 1898. By that agreement it was provided that "Spain will relinquish all claim of sovereignty over and title to Cuba," and that the respective countries would each appoint commissioners to meet at Paris and there proceed to the negotiation and conclusion of a treaty of peace. 30 Stat. at L. 1742.

Commissioners possessing full authority from their respective Governments for that purpose having met in Paris, a treaty of peace was signed on December 10, 1898, and, ratifications having been duly exchanged, it was proclaimed April 11, 1899. 30 Stat. at L. 1754.

That treaty contained, among other provisions, the following:

"Art. I. Spain relinquishes all claim of sovereignty over and title to Cuba. And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property."

"Art. XVI. It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will, upon the termination of such occupancy, advise any Government established in the island to assume the same obligations." 30 Stat. at L. 1754-1761.

On the 13th of December, 1898, an order was issued by the Secretary of War stating that, by direction of the President, a division to be known as the division of Cuba, consisting of the geographical departments and provinces of the island of Cuba, with headquarters at Havana, was created and placed under the

command of Major General John R. Brooke, United States Army, who was required, in addition to his command of the troops in the division, to "exercise the authority of Military Governor of the island." And on December 28, 1898, General Brooke, by a formal order, in accordance with the order of the President, assumed command of that division, and announced that he would exercise the authority of Military Governor of the island.

On the 1st day of January, 1899, at the palace of the Spanish Governor General in Havana, the sovereignty of Spain was formally relinquished and General Brooke immediately entered upon the full exercise of his duties as Military Governor of Cuba.

Upon assuming the positions of Military Governor and major general commanding the division of Cuba, General Brooke issued to the people of Cuba the following proclamation:

"Coming among you as the representative of the President, in furtherance and in continuation of the humane purpose with which my country interfered to put an end to the distressing condition in this island, I deem it proper to say that the object of the present Government is to give protection to the people, security to person and property, to restore confidence, to encourage the people to resume the pursuits of peace, to build up waste plantations, to resume commercial traffic, and to afford full protection in the exercise of all civil and religious rights. To this end the protection of the United States Government will be directed, and every possible provision made to carry out these objects through the channels of *civil administration, although under military control*, in the interest and for the benefit of all the people of Cuba and those possessed of rights and property in the island. The civil and criminal code which prevailed prior to the relinquishment of Spanish sovereignty will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government. The people of Cuba, without regard to previous affiliations, are invited and urged to co-operate in these objects by the exercise of moderation, conciliation, and good-will one toward another; and a hearty accord in our humanitarian purposes will insure kind and beneficent government. The Military Governor of



the island will always be pleased to confer with those who may desire to consult him on matters of public interest."

On the 11th day of January, 1899, the Military Governor, "in pursuance of the authority vested in him by the President of the United States, and in order to secure a better organization of the civil service in the island of Cuba," ordered that thereafter "the civil government shall be administered by four departments, each under the charge of its appropriate secretary," to be known, respectively, as the departments of state and government, of finance, of justice and public instruction, and of agriculture, commerce, industries and public works, each under the charge of a secretary. To these secretaries "were transferred, by the officers in charge of them, the various bureaus of the Spanish civil government." Subsequently, by order of the Military Governor, a Supreme Court for the island was created, with jurisdiction throughout Cuban territory, composed of a president or chief justice, six associate justices, one fiscal, two assistant fiscals, one secretary or chief clerk, two deputy clerks, and other subordinate employees, with administrative functions, as well as those of a court of justice in civil and criminal matters. By order of a later date, issued by the Military Governor, the jurisdiction of the ordinary courts of criminal jurisdiction was defined.

Under date of July 21, 1899, by direction of the Military Governor, a code known as the Postal Code was promulgated and declared to be the law relating to postal affairs in Cuba. That Code abrogated all laws then existing in Cuba inconsistent with its provisions. It provided that the director general of posts of the island should have the control and management of the department of posts, and prescribed numerous criminal offenses, affixing the punishments for each. It is not disputed that one of the offenses charged against Neely is included in those defined in the Postal Code established by the Military Governor of Cuba, and that the other is embraced by the Penal Code of that island which was in force when the war ensued with Spain, and which by order of the Military Governor remained in force, subject to such modifications as might be found necessary in the interest of good government.

On the 13th day of June, 1900, the present Military Gov-



error of Cuba, General Leonard Wood, made his requisition upon the President for the extradition of Neely under the act of Congress.

The facts above detailed make it clear that within the meaning of the act of June 6, 1900, Cuba is foreign territory. It cannot be regarded, in any constitutional, legal, or international sense, a part of the territory of the United States.

While by the act of April 25, 1898, declaring war between this country and Spain the President was directed and empowered to use our entire land and naval forces, as well as the militia of the several States, to such extent as was necessary to carry such act into effect, that authorization was not for the purpose of making Cuba an integral part of the United States, but only for the purpose of compelling the relinquishment by Spain of its authority and government in that island and the withdrawal of its forces from Cuba and Cuban waters. The legislative and executive branches of the Government, by the joint resolution of April 20, 1898, expressly disclaimed any purpose to exercise sovereignty, jurisdiction, or control over Cuba "except for the pacification thereof," and asserted the determination of the United States, that object being accomplished, to leave the government and control of Cuba to its own people. All that has been done in relation to Cuba has had that end in view, and, so far as the court is informed by the public history of the relations of this country with that island, nothing has been done inconsistent with the declared object of the war with Spain.

Cuba is none the less foreign territory, within the meaning of the act of Congress, because it is under a Military Governor appointed by and representing the President in the work of assisting the inhabitants of that island to establish a government of their own, under which, as a free and independent people, they may control their own affairs without interference by other nations. The occupancy of the island by troops of the United States was the necessary result of the war. That result could not have been avoided by the United States consistently with the principles of international law or with its obligations to the people of Cuba.

It is true that as between Spain and the United States—indeed, as between the United States and all foreign nations—

Cuba, upon the cessation of hostilities with Spain and after the treaty of Paris, was to be treated as if it were conquered territory. But as between the United States and Cuba that island is territory held in trust for the inhabitants of Cuba, to whom it rightfully belongs, and to whose exclusive control it will be surrendered when a stable Government shall have been established by their voluntary action.

In his message to Congress of December 6, 1898, the President said that, "as soon as we are in possession of Cuba and have pacified the island, it will be necessary to give aid and direction to its people to form a government for themselves," and that, "until there is complete tranquility in the island and a stable government inaugurated, military occupation will be continued." Nothing in the treaty of Paris stands in the way of this declared object, and nothing existed, at the date of the passage of the act of June 6, 1900, indicating any change in the policy of our Government as defined in the joint resolution of April 20, 1898. In reference to the declaration, in that resolution, of the purposes of the United States in relation to Cuba, the President in his annual message of December 5, 1899, said that the pledge contained in it "is of the highest honorable obligation, and must be sacredly kept." Indeed, the treaty of Paris contemplated only a temporary occupancy and control of Cuba by the United States. While it was taken for granted by the treaty that, upon the evacuation by Spain, the island would be occupied by the United States, the treaty provided that, "so long as such occupation shall last," the United States should "assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property." It further provided that any obligations assumed by the United States, under the treaty, with respect to Cuba, were "limited to the time of its occupancy thereof," but that the United States, upon the termination of such occupancy, should "advise any government established in the island to assume the same obligations."

It cannot be doubted that when the United States enforced the relinquishment by Spain of her sovereignty in Cuba, and determined to occupy and control that island until there was complete tranquility in all its borders and until the people of

Cuba had created for themselves a stable government, it succeeded to the authority of the displaced government so far at least that it became its duty, under international law and pending the pacification of the island, to protect, in all appropriate legal modes the lives, the liberty, and the property of all those who submitted to the authority of the representatives of this country. That duty was recognized in the treaty of Paris; and the act of June 6, 1900, so far as it applied to cases arising in Cuba, was in aid or execution of that treaty, and in discharge of the obligations imposed by its provisions upon the United States. The power of Congress to make all laws necessary and proper for carrying into execution as well as the powers enumerated in section 8 of article I. of the Constitution as all others vested in the Government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power. What legislation by Congress could be more appropriate for the protection of life and property in Cuba, while occupied and controlled by the United States, than legislation securing the return to that island, to be tried by its constituted authorities, of those who, having committed crimes there, fled to this country to escape arrest, trial, and punishment? No crime is mentioned in the extradition act of June 6, 1900, that does not have some relation to the safety of life and property. And the provisions of that act requiring the surrender of any public officer, employee, or depository fleeing to the United States after having committed in a foreign country or territory occupied by or under the control of the United States the crime of "embezzlement or criminal malversation of the public funds" have special application to Cuba in its present relations to this country.

We must not be understood, however, as saying that, but for the obligation imposed by the treaty of Paris upon the United States to protect life and property in Cuba pending its occupancy and control of that island, Congress would have been without power to enact such a statute as that of June 6, 1900, so far as it embraced citizens of the United States or persons

found in the United States who had committed crimes in the foreign territory so occupied and controlled by the United States for temporary purposes. That question is not open on this record for examination, and upon it we express no opinion. It is quite sufficient in this case to adjudge, as we now do, that it was competent for Congress, by legislation, to enforce or give efficacy to the provisions of the treaty made by the United States and Spain with respect to the island of Cuba and its people.

II. It is contended that the act of June 6, 1900, is unconstitutional and void in that it does not secure to the accused, when surrendered to a foreign country for trial in its tribunals, all of the rights, privileges, and immunities that are guaranteed by the Constitution to persons charged with the commission in this country of crime against the United States. Allusion is here made to the provisions of the Federal Constitution relating to the writ of *habeas corpus*, bills of attainder, *ex post facto* laws, trial by jury for crimes, and generally to the fundamental guarantees of life, liberty, and property embodied in that instrument. The answer to this suggestion is that those provisions have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country.

In connection with the above proposition, we are reminded of the fact that the appellant is a citizen of the United States. But such citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country, he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States. By the act in question the appellant cannot be extradited except upon the order of a judge of a court of the United States, and then only upon evidence establishing probable cause to believe him guilty of the offense charged; and when tried in the country to which he is sent, he is secured by the same act "a fair and impartial trial"—not

necessarily a trial according to the mode prescribed by this country for crimes committed against its laws, but a trial according to the modes established in the country where the crime was committed, provided such trial be had without discrimination against the accused because of his American citizenship. In the judgment of Congress these provisions were deemed adequate to the ends of justice in cases of persons committing crimes in a foreign country or territory "occupied by or under the control of the United States," and subsequently fleeing to this country. We cannot adjudge that Congress in this matter has abused its discretion, nor decline to enforce obedience to its will as expressed in the act of June 6, 1900.

III. Another contention of the appellant is that as Congress, by the joint resolution of April 20, 1898, declared that "the people of Cuba are, and of right ought to be, free and independent," and as peace has existed since, at least, the military forces of Spain evacuated Cuba on or about January, 1899, the occupancy and control of that island under the military authority of the United States is without warrant in the Constitution, and an unauthorized interference with the internal affairs of a friendly power; consequently, it is argued, the appellant should not be extradited for trial in the courts established under the orders issued by the Military Governor of the island. In support of this proposition it is said that the United States recognized the existence of the Republic of Cuba, and that the war with Spain was carried on jointly by the allied forces of the United States and of that Republic.

Apart from the view that it is not competent for the judiciary to make any declaration upon the question of the length of time during which Cuba may be rightfully occupied and controlled by the United States in order to effect its pacification—it being the function of the political branch of the Government to determine when such occupation and control shall cease, and therefore when the troops of the United States shall be withdrawn from Cuba—the contention that the United States recognized the existence of an established government known as the Republic of Cuba, but is now using its military or executive power to displace or overthrow it is without merit. The declaration by Congress that the people of Cuba were, and of right ought to

be, free and independent, was not intended as a recognition of the existence of an organized government instituted by the people of that island in hostility to the government maintained by Spain. Nothing more was intended than to express the thought that the Cubans were entitled to enjoy—to use the language of the President in his message of December 5, 1897—that “measure of self-control which is the inalienable right of man, protected in their right to reap the benefit of the exhaustless treasure of their country.” In the same message the President said: “It is to be seriously considered whether the Cuban insurrection possesses beyond dispute the attributes of statehood, which alone can demand the recognition of belligerency in its favor. The same requirement must certainly be no less seriously considered when the graver issue of recognizing independence is in question.” Again, in his message of April 11, 1898, referring to the suggestion that the independence of the Republic of Cuba should be recognized before this country entered upon war with Spain, he said: “Such recognition is not necessary in order to enable the United States to intervene and pacify the island. To commit this country now to the recognition of any particular government in Cuba might subject us to embarrassing conditions of international obligation toward the organization to be recognized. In case of intervention our conduct would be subject to the approval or disapproval of such government. We should be obliged to submit to its direction, and to assume to it the mere relation of a friendly ally.” To this may be added the significant fact that the first part of the joint resolution as originally reported from the Senate committee read as follows: “That the people of the island of Cuba are, and of right ought to be, free and independent, *and that the government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the island.*” But upon full consideration the views of the President received the sanction of Congress, and the words in italics were stricken out. It thus appears that both the legislative and executive branches of the Government concurred in not recognizing the existence of any such Government as the Republic of Cuba. It is true that the co-operation of troops commanded by Cuban officers was accepted by the military authorities of the United States in its



efforts to overthrow Spanish authority in Cuba. Yet from the beginning to the end of the war the supreme authority in all military operations in Cuba and in Cuban waters against Spain was with the United States, and those operations were not in any sense under the control or direction of the troops commanded by Cuban officers.

We are of opinion, for the reasons stated, that the act of June 6, 1900, is not in violation of the Constitution of the United States, and that this case comes within the provisions of that act. The court below having found that there was probable cause to believe the appellant guilty of the offenses charged, the order for his extradition was proper, and no ground existed for his discharge on *habeas corpus*.

*The judgment of the Circuit Court is therefore affirmed.*

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TERLINDEN V. AMES.

184 U. S. 270—22 Sup. Ct. Rep. 484—46 L. Ed. 534—34 Chi. L. N. 225.

Decided February 24, 1902.

EXTRADITION: \* *Habeas corpus—Practice—Change in the status of foreign government—Continued existence of treaty—Executive and judicial functions—Extradition based on positive law.*

1. A writ of *habeas corpus*, unlike a writ of error, is not effective against mere irregularities; but operates only against void proceedings and illegal imprisonments.
2. The statute does not give any right of judicial review of extradition proceedings; and what cannot be done directly cannot indirectly through a writ of *habeas corpus*; but the court may "inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion."
3. The complaint on its face, charging extraditable offenses; and the petitioner having failed in his petition and in his traverse to the return, to set out the necessary documents and matters of fact to show, according to the warrant issued in, and the criminal

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\*See EXTRADITION in Table of Topics.



code of the demanding country, the matters complained of are not extraditable, the presumptions are against him; nor is he entitled to *certiorari*, to supply the insufficiencies.

4. The question as to the existence of treaties is a political and not a judicial question.
5. The treaty with the Kingdom of Prussia, entered into in 1852, being continuously recognized in diplomatic relations between the United States and the Empire of Germany, since the organization of that empire, will be accepted by the courts as continuing in force.
6. "In the United States the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision.

Appeal from the District Court of the United States from an order denying a discharge upon a writ of *habeas corpus*, etc. Argued in the Supreme Court January 6 and 7, 1902. Affirmed.

Statement by Mr. Chief Justice Fuller:

August 15, A. D. 1901, Dr. Walther Wever, Imperial German Consul at Chicago, filed his complaint before Mark A. Foote, Esq., a commissioner of the United States in and for the Northern District of Illinois, and specially authorized to issue warrants for the apprehension of fugitives from justice of foreign Government, stating that he was "the duly accredited official agent and representative of the German Empire at Chicago and also the Kingdom of Prussia, forming a part of said German Empire," and charging that one Gerhard Terlinden, alias Theodor Graefe, a subject of the Kingdom of Prussia, did, within the first six months of the year 1901, "commit within the jurisdiction of the said Kingdom of Prussia various crimes of forgery and counterfeiting and the utterance of forged papers," in that as a director of the Gerhard Terlinden Stock Company, organized and doing business in said Kingdom, said Terlinden forged and counterfeited certain certificates of the stock of said company amounting to about a million and a half of marks, and put out, uttered, and disposed of the same to Robert Suermont of the city of Aachen, Prussia; the Amsterdamsche Bank, Netherlands; the Disconto Gesellschaft, a corporation doing business in Berlin, Prussia; and other persons and corporations, with felonious intent to cheat and defraud them respectively. The complaint further charged that Terlinden was at the time

of committing said crimes a resident of the city of Duisburg and a citizen of said Kingdom of Prussia; that he was a fugitive from said Kingdom; that on or about the 1st day of July, 1901, he fled into the jurisdiction of the United States of America for the purpose of seeking an asylum therein; that he was now said to be concealed within the Northern District of Illinois or in the Eastern District of Wisconsin; and that the crimes with which he was charged were crimes embraced within the treaty of extradition between the United States and the Kingdom of Prussia, concluded on the 16th day of June, 1852, and ratified May 30, 1853.

It was therefore prayed that a warrant be issued for the apprehension and commitment of Terlinden "in order that the evidence of his criminality may be inquired into, and the said Gerhard Terlinden, alias Theodor Graefe, may be extradited and delivered up to the justice of the said Kingdom of Prussia, in accordance with the stipulations of said treaty and the acts of Congress passed in pursuance thereof."

The complaint was duly verified and the commissioner issued his warrant, which was placed in the hands of John C. Ames, United States Marshal in and for the Northern District of Illinois, and Terlinden was apprehended and held to be dealt with according to law.

Subsequently and on September 25, 1901, Dr. Wever, in his capacity aforesaid, made another complaint before the commissioner, charging (1) the forging of a large number of stock certificates of the Gerhard Terlinden Stock Company; (2) uttering said stock certificates, well knowing them to be forged; (3) forging and counterfeiting the steel stamp of the Royal Prussian revenue office at Duisburg, Prussia; (4) imprinting said forged steel stamp upon the forged certificates of stock so as to make it appear that the tax required by the Prussian revenue law had been paid on said certificates issued by the company in said Kingdom, and thus to give said forged certificates the appearance of genuineness; (5) uttering forged certificates of stock with said forged stamp thereon; (6) forging the acceptance of one Heinrich Schulte to a certain draft for 9,582 marks and 35 pfennings, and uttering the same; (7) forging

the acceptance of one Wilhelm Seven to two certain drafts for the sums of 26,250 marks and of 25,912 marks and 45 pfennings, respectively, and uttering the same; or causing all these things to be done; "contrary to the laws of the Kingdom of Prussia."

It was stated that these several crimes were fully shown by the testimony of a number of witnesses heard before the examining judge of the Landgericht at Duisburg in the Kingdom of Prussia, "a court of competent jurisdiction in which the matter of the penal investigation instituted against the said Gerhard Terlinden, alias Theodor Graefe, is now pending in order that he may answer for said several crimes;" and with the complaint were submitted copies of the depositions of the witnesses together with a copy of the warrant of arrest issued by that court against Terlinden, "and of the provisions of the Penal Code of the German Empire applicable to said several crimes and providing punishment therefor," all of which were duly authenticated; and also a verified English translation thereof. This second complaint also showed that the crimes charged were committed within the jurisdiction of the Kingdom of Prussia; and that Terlinden was, at the time of committing the same, a subject of that Kingdom; and the commissioner in accordance with the prayer of the complaint issued another warrant, which was served on Terlinden the following day, he being discharged from arrest on the first warrant. On the 17th of October, before any evidence was taken before the commissioner, Terlinden presented to the District Court of the United States for the Northern District of Illinois his petition praying for a writ of *habeas corpus* on the following grounds:

"1. No treaty or convention for the extradition of fugitives from justice exists between the United States and the German Empire.

"2. That the treaty or convention for the extradition of fugitives from justice concluded between the United States and the Kingdom of Prussia on the 16th day of June, 1852, and ratified May 30, A. D. 1853, was terminated by the creation of the German Empire and the adoption of the Constitution of said Empire in A. D. 1871, and that no treaty or convention for the ex-

tradition of fugitives from justice has been concluded between the United States, on the one part, and the Kingdom of Prussia or the German Empire, on the other, since said time.

"3. Said complaint does not charge an extraditable offense under the provisions of the treaty of 1852, concluded between the United States and Prussia and other German States, were said treaty still in force and of binding effect.

"4. Your petitioner is not guilty of any extraditable offense under the provisions of said treaty of 1852, were said treaty still in force and of binding effect.

"5. All proceedings had or attempted to be had before said commissioner under said complaint and warrant are illegal, void, and without authority in law because said commissioner did not have jurisdiction over the person of this petitioner."

The writ of *habeas corpus* was issued and the marshal for the Northern District of Illinois filed his return October 21, setting forth that he "arrested said petitioner within said district on the 26th day of September, 1901, upon a warrant duly issued by Mark A. Foote, a United States Commissioner especially appointed and authorized by the District Court of the United States for the Northern District of Illinois to hear applications for extradition and to issue warrants therefor, which said warrant was duly issued by said commissioner upon a complaint duly made by Walther Wever, Imperial German Consul at Chicago as representative of the Kingdom of Prussia, charging said Gerhard Terlinden, who, it appears, falsely assumed in this country the name of Theodor Graefe, with having, as a subject of the Kingdom of Prussia and within the jurisdiction of the said Kingdom, committed the crimes of forgery, counterfeiting, and the utterance of forged instruments, and with being a fugitive from justice of said Kingdom of Prussia. . . ."

The matter was brought on for hearing October 21, and after arguments of counsel the court gave leave to present briefs and adjourned the hearing to October 28. On this day the relator filed with the clerk of the court a traverse, reciting that with the complaint of September 26 there were filed "copies of the original testimony and translations of the same contained in the depositions taken before certain court officials in the Empire of Germany, relative to the alleged offenses with which said com-

plaint charges your petitioner; that the said complaint refers to said depositions so filed in words following, to wit:” (Then setting forth the passages of the complaint to the effect that Dr. Wever therewith submitted “to the commissioner and files with this complaint a copy of all depositions of witnesses taken in said matter, together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe, and of the provisions of the Penal Code of the German Empire applicable to said several crimes and providing punishment therefor.”)

The traverse then continued:

“That the provisions of the Criminal Code of the German Empire applicable to the facts and circumstances of this case as shown by the evidence hereto annexed are sections 240, 47, 49, 1st paragraph; section 360, 4th and 5th paragraphs; section 275 and section 56 of the Code of Criminal Procedure, also section 234 of the Civil Code, a correct translation of which sections are hereto annexed and marked Exhibit ‘B’ and made a part thereof.

“That said depositions so filed do not show or tend to show that your petitioner is guilty of any extraditable offense; that a copy of said deposition so referred to in said complaint and heretofore filed with said commissioner is hereto attached marked Exhibit ‘A’ and made a part of this traverse.

“Wherefore your petitioner prays that the return of the United States Marshal herein be dismissed and your petitioner discharged.”

Copies of depositions were attached to the alleged traverse; but no copy of the warrant of arrest issued by the court at Duisburg, or of the provisions of the Penal Code attached to the complaint.

An affidavit accompanied the traverse to the effect that affiant as an expert had made the annexed translations of certain sections and parts of sections of the German Criminal and Civil Codes.

October 29, to which day the hearing of the cause had been continued, Terlinden presented a petition for a writ of *certiorari* to bring before the court “for its consideration the depositions, provisions of the German Criminal Code and copy of

the original warrant issued by said German court heretofore referred to."

This application was denied by the District Court, October 31, and the court ordered "that the question of whether since the information of the German Empire the extradition treaty concluded between the Government of the United States and the Kingdom of Prussia in 1852 is still in force or abrogated by the Constitution of the German Empire, be submitted to the court on briefs to be filed," and continued the hearing. It was also ordered "that said relator be remanded to the custody of the marshal, and that the motion to stay all further proceedings before the United States Commissioner be and the same hereby is denied."

Thereafter, on November 5, the District Court entered an order finding that the petitioner was lawfully restrained of his liberty, directing the petition to be dismissed, and remanding petitioner, from which an appeal was taken to this court. Errors were assigned, in substance, that the court erred in declining to hold that no treaty exists between the United States and the Kingdom of Prussia or the German Empire; in assuming the existence of such treaty; in denying the right to introduce evidence for the purpose of showing that no extraditable offense has been committed; in denying the application for a *certiorari*; in holding that the record showed the commission of an extraditable offense.

Messrs. *Albert W. May, A. C. Umbreit, and Joseph B. Doe*, for appellant.

Messrs. *William Vocke and William Mannhardt*, for appellee.

Mr. Chief Justice Fuller delivered the opinion of the court: The treaty of June 16, 1852, between the United States and the Kingdom of Prussia, and other States of the Germanic Confederation included in or which might accede to that convention, provided that the parties thereto should, upon requisition, "deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of



forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party, shall seek an asylum, or shall be found within the territories of the other." 10 Stat. at L. 964, 966.

Pursuant to section 5270 (a) of the Revised Statutes (and the acts from which that section was brought forward), complaint was duly made before a commissioner appointed and authorized by the District Court of the United States for the Northern District of Illinois to hear applications for extradition and to issue warrants therefor, charging Terlinden with having, as a subject of the Kingdom of Prussia, and within the jurisdiction of that Kingdom, committed the crimes of forgery, counterfeiting, and the utterance of forged instruments, and with being a fugitive from the justice of said Kingdom.

The complaint charged with much particularity, among other things, the forging and uttering of forged stock certificates of the Gerhard Terlinden Stock Company; the forging of the revenue stamp of the German Government employed by the Royal Prussian Revenue Office; and the forging and uttering of several enumerated acceptances.

Attached to the complaint and referred to therein were duly authenticated (b) copies of certain depositions taken before the examining judge of the court of Duisburg, Prussia, in which an investigation against Terlinden, that he might answer for said several crimes, was pending, together with a copy of the warrant for the arrest of Terlinden issued by that court, and of the provisions of the Penal Code of the German Empire applicable to the crimes in question and providing punishment therefor.

The commissioner issued his warrant and Terlinden was apprehended, whereupon and before the commissioner had entered upon the hearing, Terlinden petitioned and obtained from the District Court the writ of *habeas corpus* under consideration.

The settled rule is that the writ of *habeas corpus* cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before



him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on *habeas corpus*. *Ornelas v. Ruiz*, 161 U. S. 502, 508, 40 L. Ed. 787, 789, 16 Sup. Ct. Rep. 689, and cases cited; *Bryant v. United States*, 167 U. S. 104, *sub. nom. Ex parte Bryant*, 42 L. Ed. 94, 17 Sup. Ct. Rep. 744.

The statute in respect to extradition gives no right of review to be exercised by any court or judicial officer, and what cannot be done directly cannot be done indirectly through the writ of *habeas corpus*. The court issuing the writ may, however, "inquire and adjudge whether the commissioner acquired jurisdiction of the matter, by conforming to the requirements of the treaty and the statute; whether he exceeded his jurisdiction; and whether he had any legal or competent evidence of facts before him, on which to exercise a judgment as to the criminality of the accused. But such court is not to inquire whether the legal evidence of facts before the commissioner was sufficient or insufficient to warrant his conclusion." Blatchford, J., in *Re Stupp*, 12 Blatchf. 501, Fed. Cas. No. 13,563; *Ornelas v. Ruiz*, 161 U. S. 508, 40 L. Ed. 787, 16 Sup. Ct. Rep. 689.

By section 754 of the Revised Statutes it is provided that the complaint in *habeas corpus* shall set forth "the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known;" and by section 755 that the writ shall be awarded "unless it appears from the petition itself that the party is not entitled thereto."

On the face of the complaint extraditable offenses were charged to have been committed, and if petitioner desired to assert, as he now does in argument, that it appeared from the depositions taken before and the warrant of arrest issued by the court at Duisburg and the provisions of the Criminal Code that such was not the fact, they should have been set out. *Craemer v. Washington*, 168 U. S. 128, 42 L. Ed. 407, 18 Sup. Ct. Rep. 1.

And this clearly must be so where, as in this case, the writ is issued and petitioner undertakes to traverse the return. The

return was that Terlinden was arrested and held by virtue of warrants of arrest and of commitment issued by the commissioner, under the extradition acts, against Terlinden as a fugitive from the justice of Prussia, and charged with the commission of crimes embraced by the treaty of extradition with that Kingdom; and copies of the warrants were attached as part thereof. The alleged traverse referred to the complaint and annexed copies of the depositions filed with it, but did not annex a copy of the warrant of arrest issued by the court at Duisburg, or of the provisions of the Penal Code made part of the complaint; and also annexed certain sections and paragraphs of the Criminal Code of the German Empire, and of the Code of Criminal Procedure, and of the Civil Code, as applicable to "the facts and circumstances of the case," and then alleged that the depositions did not show or tend to show guilt of an extraditable offense.

This was manifestly insufficient. Petitioner could not select a portion of the documents accompanying the complaint and ask the court to sustain his conclusions of law therein. Nor could he subsequently supply the inadequacy of the traverse by a *certiorari*, which could do no more, if it could be, in any view, properly issued at that stage of the proceedings, than bring up what he should have furnished in the first instance.

Generally speaking, "whether an extraditable crime has been committed is a question of mixed law and fact, but chiefly of fact, and the judgment of the magistrate rendered in good faith on legal evidence that the accused is guilty of the act charged, and that it constitutes an extraditable crime, cannot be reviewed on the weight of evidence, and is final for the purposes of the preliminary examination unless palpably erroneous in law." 161 U. S. 509, 40 L. Ed. 789, 16 Sup. Ct. Rep. 691.

Necessarily this is so, for where jurisdiction depends on the merits, the decision is not open to collateral attack involving a retrial, although if on the whole record the findings are contradicted, the inquiry as to lack of jurisdiction may be entertained.

In this case the writ of *habeas corpus* was issued before the examination by the commissioner had been entered upon, and his jurisdiction was the only question raised. If he had juris-

diction, the District Court could not interfere, and he had jurisdiction if there was a treaty and the commission of extraditable offenses was charged.

But it is said that the offenses complained of were not extraditable because their commission were averred to be "contrary to the laws of Prussia," whereas the criminal laws asserted to have been violated were those of the German Empire, and Prussia had no criminal laws dealing with such offenses. Hence it is argued that the commissioner had no jurisdiction, because if an extradition treaty existed it was with Prussia, and not with the German Empire; and if any crime was committed, it was against the German Empire and not Prussia.

It is true that by article 2 of the Constitution of the German Empire it was provided that, "within this territory the Empire shall have the right of legislation according to the provisions of this Constitution, and the laws of the Empire shall take precedence of those of each individual State."

And by article 4: "The following matters shall be under the supervision of the Empire and its legislation: . . .

13. General legislation regarding the law of obligations, criminal law, commercial law, and the law of exchange; likewise judicial proceedings."

Counsel for petitioner states in his brief that on January 1, 1872, the German Imperial Code went into effect, embracing provisions as to the crime of forgery "contained in sections 267, 268, 146, and 149, the very sections quoted in the depositions filed with the amended complaint." Counsel for respondent agrees with this except that he includes sections or paragraphs 147 and 270. All these are given below as furnished by counsel for respondent.(c) And see Drage's Criminal Code of the German Empire, 227, 266. The traverse set up that there were filed with the complaint "a copy of all depositions taken in said matter, together with a copy of the warrant of arrest issued by said court against the said Gerhard Terlinden, alias Theodor Graefe, and of the provisions of the Penal Code of the German Empire applicable to said several crimes and providing punishment therefor." The traverse did not set forth the warrant of arrest or the provisions of the Code referred to, and merely attached certain other provisions which it

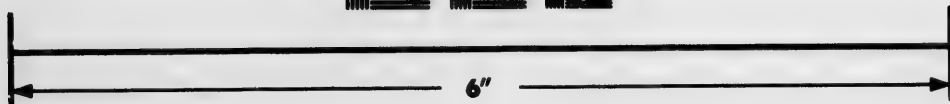
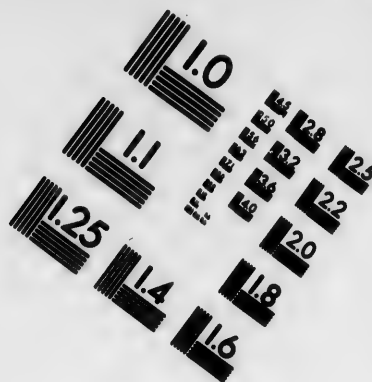
was averred were applicable. The presumptions were against petitioner, apart from which accepting the admissions of counsel, extraditable offenses were charged, if the laws quoted applied, as we think cannot be denied. We are unable to perceive that these laws were not the laws of Prussia, although prescribed by imperial authority, and the record discloses that they were being administered as such, in Prussia, by the Royal Prussian Circuit Court at Duisburg. The inquiry into the source of the laws of the demanding Government is not material, and the objection is untenable.

It is obvious that the District Court could not remove the case from the commissioner by virtue of the writ of *habeas corpus*, and that the court rightly declined to hear evidence, to grant the *certiorari*, or to interfere with the progress of the case. This brings us to the real question, namely, the denial of the existence of a treaty of extradition between the United States and the Kingdom of Prussia, or the German Empire. In these proceedings the application was made by the official representative of both the Empire and the Kingdom of Prussia, but was based on the extradition treaty of 1852. The contention is that, as the result of the formation of the German Empire, this treaty has been terminated by operation of law.

Treaties are of different kinds and terminable in different ways. The 5th article of this treaty provided, in substance, that it should continue in force until 1858, and thereafter until the end of a twelve months' notice by one of the parties of the intention to terminate it. No such notice has ever been given, and extradition has been frequently awarded under it during the entire intervening time.

Undoubtedly treaties may be terminated by the absorption of powers into other nationalities and the loss of separate existence, as in the case of Hanover and Nassau, which became by conquest incorporated into the Kingdom of Prussia in 1866. Cessation of independent existence rendered the execution of treaties impossible. But where sovereignty in that respect is not extinguished, and the power to execute remains unimpaired, outstanding treaties cannot be regarded as avoided because of impossibility of performance.

This treaty was entered into by His Majesty the King of



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Prussia in his own name and in the names of eighteen other States of the Germanic Confederation, including the Kingdom of Saxony and the free city of Frankfort, and was acceded to by six other States, including the Kingdom of Wurtemberg, and the free Hanseatic city of Bremen, but not including the Hanseatic free cities of Hamburg and Lubeck. The war between Prussia and Austria in 1866 resulted in the extinction of the Germanic Confederation and the absorption of Hanover, Hesse Cassel, Nassau, and the free city of Frankfort, by Prussia.

The North German Union was then created under the *præsidium* of the Crown of Prussia, and our minister to Berlin, George Bancroft, thereupon recognized officially, not only the Prussian Parliament, but also the Parliament of the North German United States, and the collective German Customs and Commerce Union, upon the ground that by the paramount Constitution of the North German United States, the King of Prussia, to whom he was accredited, was at the head of those several organizations or institutions; and his action was entirely approved by this Government. Messages and Documents, Dep. of State, 1867-8, Part 1, p. 601; Dip. Correspondence, Secretary Seward to Mr. Bancroft, Dec. 9, 1867.

February 22, 1868, a treaty relative to naturalization was concluded between the United States and His Majesty, the King of Prussia, on behalf of the North German Confederation, the 3d article of which read as follows: "The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part and Prussia and other States of Germany on the other part, the sixteenth day of June, one thousand eight hundred and fifty-two, is hereby extended to all the States of the North German Confederation." 15 Stat. at. L. 615. This recognized the treaty as still in force, and brought the Republics of Lubeck and Hamburg within its scope. Treaties were also made in that year between the United States and the Kingdoms of Bavaria and Wurtemberg, concerning naturalization, which contained the provision that the previous convention between them and the United States in respect of fugitives from justice should remain in force without change.



Then came the adoption of the Constitution of the German Empire. It found the King of Prussia, the chief executive of the North German Union, endowed with power to carry into effect its international obligations, and those of his Kingdom, and it perpetuated and confirmed that situation. The official promulgation of that Constitution recited that it was adopted instead of the Constitution of the North German Union, and its preamble declared that "His Majesty the King of Prussia, in the name of the North German Union, His Majesty the King of Bavaria, His Majesty the King of Wurtemberg, His Highness the Grand Duke of Baden, and His Royal Highness the Grand Duke of Hesse, and by Rhine for those parts of the Grand Duchy of Hesse which are situated south of the Main, conclude an eternal alliance for the protection of the territory of the Confederation, and of the laws of the same, as well as for the promotion of the welfare of the German people." As we have heretofore seen, the laws of the Empire were to take precedence of those of the individual States, and it was vested with the power of general legislation in respect of crimes.

Article 11 reads: "The King of Prussia shall be the president of the Confederation, and shall have the title of German Emperor. The Emperor shall represent the Empire among nations, declare war, and conclude peace in the name of the same; enter into alliances and other conventions with foreign countries, accredit ambassadors, and receive them. . . . So far as treaties with foreign countries refer to matters which, according to article IV., are to be regulated by the legislature of the Empire, the consent of the Federal Council shall be required for their ratification, and the approval of the Diet shall be necessary to render them valid."

It is contended that the words in the preamble translated "an eternal alliance" should read "an eternal union," but this is not material, for admitting that the Constitution created a composite State instead of a system of confederated States, and even that it was called a confederated Empire rather to save the *amour propre* of some of its component parts than otherwise, it does not necessarily follow that the Kingdom of Prussia lost its identity as such, or that treaties theretofore entered into by it could not be performed either in the name of its King or that of the Em-

peror. We do not find in this Constitution any provision which in itself operated to abrogate existing treaties or to affect the *status* of the Kingdom of Prussia in that regard. Nor is there anything in the record to indicate that outstanding treaty obligations have been disregarded since its adoption. So far from that being so, those obligations have been faithfully observed.

And without considering whether extinguished treaties can be renewed by tacit consent under our Constitution, we think that on the question whether this treaty has ever been terminated, governmental action in respect to it must be regarded as of controlling importance. During the period from 1871 to the present day, extradition from this country to Germany, and from Germany to this country, has been frequently granted under the treaty, which has thus been repeatedly recognized by both Governments as in force. Moore's Report on Extradition with Returns of all Cases, 1890.

In 1889, in response to a request for information on international extradition as practiced by the German Government, the Imperial Foreign Office transmitted to our Chargé at Berlin a memorial on the subject in the note accompanying which it was said: "The questions referred to, in so far as they could not be uniformly answered for all the Confederated German States, have been answered in that document as relating to the case of applications for extradition addressed to the Empire or Prussia." It was stated in the memorial, among other things:

"In so far as by-laws and treaties of the Empire relating to the extradition of criminals, provisions which bind all the States of the union have not been made, those States are not hindered from independently regulating extradition by agreements with foreign States, or by laws enacted for their own territory.

"Of conventions, some of an earlier, some of a later, period, for the extradition of criminals, entered into by individual States of the union with various foreign States, there exist a number, and in particular such with France, the Netherlands, Austria-Hungary, and Russia. With the United States of America, also, extradition is regulated by various treaties, as, besides the treaty of June 16, 1852, which applies to all of the States of the former North German Union, and also to Hesse, south of the Main, and to Wurtemberg, there exist separate

treaties with Bavaria and Baden, of September 12, 1853, and January 30, 1857, respectively." Moore's Report, 93, 94.

Thus it appears that the German Government has officially recognized, and continues to recognize, the treaty of June 16, 1852, as still in force, as well as similar treaties with other members of the Empire, so far as the latter has not taken specific action to the contrary or in lieu thereof. And see Laband, *Das Staatsrecht des Deutschen Reiches* (1894), 122, 123, 124, 142.

It is out of the question that a citizen of one of the German States, charged with being a fugitive from its justice, should be permitted to call on the courts of this country to adjudicate the correctness of the conclusions of the Empire as to its powers and the powers of its members, and especially as the Executive Department of our Government has accepted those conclusions and proceeded accordingly.

The same is true as respects many other treaties of serious moment, with Prussia, and with particular States of the Empire, and it would be singular, indeed, if after the lapse of years of performance of their stipulations, these treaties must be held to have terminated because of the inability to perform during all that time of one of the parties.

In the notes accompanying the State Department's compilation of *Treaties and Conventions between the United States and Other Powers*, published in 1889, Mr. J. C. Bancroft Davis treats of the subject thus:

"The establishment of the German Empire in 1871, and the complex relations of its component parts to each other and to the Empire, necessarily give rise to questions as to the treaties entered into with the North German Confederation, and with many of the States composing the Empire. It cannot be said that any fixed rules have been established.

"Where a State has lost its separate existence, as in the case of Hanover and Nassau, no questions can arise.

"Where no new treaty has been negotiated with the Empire, the treaties with the various States which have preserved a separate existence have been resorted to.

"The question of the existence of the extradition treaty with Bavaria was presented to the United States District Court, on

the application of a person accused of forgery committed in Bavaria, to be discharged on *habeas corpus*, who was in custody after the issue of a mandate, at the request of the Minister of Germany. The court held that the treaty was admitted by both Governments to be in existence.

"Such a question is, after all, purely a political one."

The case there referred to is that of *Re Thomas*, 12 Blatchf. 370, Fed. Cas. No. 13,887, in which the continuance of the extradition treaty with Bavaria was called in question, and Mr. Justice Blatchford, then District Judge, said:

"It is further contended, on the part of Thomas, that the convention with Bavaria was abrogated by the absorption of Bavaria into the German Empire. An examination of the provisions of the Constitution of the German Empire does not disclose anything which indicates that then existing treaties between the several States composing the confederation called the German Empire, and foreign countries, were annulled, or to be considered as abrogated.

"Indeed, it is difficult to see how such a treaty as that between Bavaria and the United States can be abrogated by the action of Bavaria alone, without the consent of the United States. Where a treaty is violated by one of the contracting parties, it rests alone with the injured party to pronounce it broken, the treaty being, in such case, not absolutely void, but voidable, at the election of the injured party, who may waive or remit the infraction committed, or may demand a just satisfaction, the treaty remaining obligatory if he chooses not to come to a rupture. 1 Kent, Com. 174. In the present case the mandate issued by the Government of the United States shows that the convention in question is regarded as in force both by the United States and by the German Empire, represented by its envoy, and by Bavaria, represented by the same envoy. The application of the foreign Government was made through the proper diplomatic representative of the German Empire and of Bavaria, and the complaint before the commissioner was made by the proper consular authority representing the German Empire and also representing Bavaria."

We concur in the view that the question whether power remains in a foreign State to carry out its treaty obligations is in

its nature political, and not judicial, and that the courts ought not to interfere with the conclusions of the political department in that regard.

Treaties of extradition are executory in their character, and fall within the rule laid down by Chief Justice Marshall in *Foster v. Neilson*, 2 Pet. 314, 7 L. ed. 435, thus: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department."

In *Doe ex dem. Clark v. Braden*, 16 How. 635, 14 L. Ed. 1090, where it was contended that so much of the treaty of February 22, 1819, ceding Florida to the United States, as annulled a certain land grant, was void for want of power in the King of Spain to ratify such a provision, it was held that whether or not the King of Spain had power, according to the Constitution of Spain, to annul the grant, was a political, and not a judicial, question, and was decided when the treaty was made and ratified.

Mr. Chief Justice Taney said: "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, unless they violate the Constitution of the United States. It is their duty to interpret it and administer it according to its terms. And it would be impossible for the Executive Department of the Government to conduct our foreign relations with any advantage to the country, and fulfill the duties which the Constitution has imposed upon it, if every court in the country was authorized to inquire and decide whether the person who ratified the treaty on behalf of a foreign nation had the power, by its Constitution and laws, to make the engagements into which he entered."

Extradition may be sufficiently defined to be the surrender by one nation to another of an individual accused or convicted of an offense outside of its own territory, and within the territorial jurisdiction of the other, which, being competent to try and to punish him, demands the surrender.

In the United States, the general opinion and practice have been that extradition should be declined in the absence of a conventional or legislative provision. 1 Moore, Extradition, 21; *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234.

The power to surrender is clearly included within the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. *Holmes v. Jennison*, 14 Pet. 569, 10 L. ed. 593. Its exercise pertains to public policy and governmental administration, is devolved on the executive authority, and the warrant of surrender is issued by the Secretary of State as the representative of the President in foreign affairs.

If it be assumed in the case before us—and the papers presented on the motion for a stay advise us that such is the fact—that the commissioner, on hearing, deemed the evidence sufficient to sustain the charges, and certified his findings and the testimony to the Secretary of State, and a warrant for the surrender of Terlinden on the proper requisition was duly issued, it cannot be successfully contended that the courts could properly intervene on the ground that the treaty under which both Governments had proceeded had terminated by reason of the adoption of the Constitution of the German Empire, notwithstanding the judgment of both Governments to the contrary.

The decisions of the Executive Department in matters of extradition, within its own sphere, and in accordance with the Constitution, are not open to judicial revision, and it results that where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of *habeas corpus*.

*The District Court was right, and its final order is affirmed.*

Mr. Justice Harlan did not hear the argument, and took no part in the decision of the case.

Marginal citations referred to in opinion.

(a) Sec. 5270. Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person



found within the limits of any State, district or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issues his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

(b) Sec. 5271. In every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomat or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section.

(c) 267. Whoever with unlawful intent forges or counterfeits a domestic or foreign public instrument or such a private instrument as may be of importance for the purpose of proving rights or legal relations, and makes use of the same for the purpose of deception, is punishable with imprisonment for forgery of instruments.

268. Forgery of an instrument made by anyone with the intent of obtaining for himself or another a pecuniary gain, or to inflict injury upon another, is punishable as follows:

1. When the instrument is a private instrument, with imprisonment in the penitentiary up to five years, besides which a fine not exceeding 3,000 marks may be imposed.

2. When the instrument is a public instrument, with imprisonment in the penitentiary for a term not exceeding ten years, besides which a fine of from 150 to 6,000 marks may be imposed.

In case of mitigating circumstances imprisonment in the common jail will take place, which, in the case of forgery of a private instrument, shall be not less than one week, and in the case of forgery of a public instrument, not less than three months.

In addition to the imprisonment, a fine not exceeding three thousand marks may be imposed.

146. Whoever counterfeits inland or foreign coin or paper money for the purpose of using such counterfeited money as genuine or otherwise to put it in circulation; or who, with like intent, gives to genuine money, by alteration made upon the same, the appearance of higher



value, or gives to invalidated money the appearance of money still current, shall be punished with imprisonment in the penitentiary for not less than two years. Police surveillance is also admissible. In the case of mitigating circumstances imprisonment in the county jail may be provided.

147. The same penalty extends to all persons who circulate the money counterfeited or altered by them with the above-mentioned intent, and also to such persons who obtain counterfeited or altered money and either utter the same or bring the same from abroad with the intent of circulating the same.

149. Certificates of indebtedness made payable to the holder, bank notes, stock certificates or preliminary certificates or receipts taking their place, as well as coupons and dividends or renewal certificates thereto belonging, which may be issued by the Empire, the North German Confederation, a State of the Confederation, or a foreign State, or by any other community, corporation, company or private person authorized to issue such papers, are deemed equivalent to paper money.

270. It is treated as equivalent to forgery of an instrument in case anybody makes use of any forged or altered document, knowing the same to be forged or altered, with intent to deceive.

NOTES ON THE LAW OF EXTRADITION (by J. F. G.).—The extradition cases reported in this volume, several of which are from the highest judicial tribunal in the land, cover so many phases of that branch of the law that a few suggestions at this place will be sufficient.

*Extradition is not a matter of comity between the United States and other nations; or between States of the Union.*—Whatever is or may have been the practice in foreign countries, where the doctrine of *King and subject* is or was recognized, no extradition can lawfully be granted, by either National or State authority, within the territory of the United States, except upon positive written law. The organic character of our National and State Government recognizes the right of individual freedom superior to the arbitrary will of a President or Governor. By the United States Constitution the States are denied the functions of a nation in international or interstate matters; except where such power is expressly granted; while the United States, being created by the Constitution, is limited to the powers therein granted to it. With us, international extradition is based on the delegated constitutional power of the National Government to enter into treaties with foreign nations. This being the sole power, the law governing each case is created by, and limited to, the provisions of some treaty duly ratified and proclaimed in accordance with the Constitution. (This is substantially the rule announced in *Terlinden v. Ames*, in the present volume.)

*The American non-comity doctrine* is very ably reviewed by Mr. Spear in the first chapter of his work, entitled "The Law of Extradition." He reviews the subject historically, and quotes from the opinions of various attorney generals, as well as courts, sustaining the doctrine that there can be no extradition from the United States unless it is authorized by treaty. Among the authorities he cites are the following: *Respublica v. Longchamps* (1784), 1 Dall. 120; *Case of William Jones* (1797), 1 Op. Att. Gen. 68; *Sullivan's Case* (1821), 1 Op.

Att. Gen. 509; *Case of Two Portuguese Seamen*, 2 Op. Att. Gen. 559; *Application of Chevalier Huggens*, 2 Op. Att. Gen. 452; *De Witt's Case*, 3 Op. Att. Gen. 661; *Wing's Case*, 6 Op. Att. Gen. 85; *Case of a De-serter from the Danish Ship Sago*, 6 Op. Att. Gen. 155; *Hamilton's Case*, 6 Op. Att. Gen. 431; *Commonwealth v. Deacon* (1823), 10 Serg. & Rawle, 125; *United States v. Davis* (1837), 2 Sumn. 482; *Case of Jose Ferreira Dos Santos*, 2 Brock. 493; *Matter of the British Prisoners* (1845), 1 Woodb. & Minot, 66; *Adriance v. Lagrave*, 59 N. Y. 110; *Commonwealth v. Hawes*, 17 Albany Law Jour. 325; *Matter of Metzger*, 5 How. (U. S.) 176; *Holmes v. Jennison*, 14 Pet. 540; *People ex rel. Francis Barlow v. Curtis*, 50 N. Y. 321. He cites as a single exception *Matter of Daniel Washburn* (1819), 4 Johns. Ch. 105.

So strict is the non-comity doctrine applied to interstate extradition that it has been held (*Hyatt v. People*, present volume) that even clause 2, section 2, article 4, of the United States Constitution, which reads: "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime," does not, of itself, give the right to remove a fugitive from one State to another, but that it requires the action of Congress to put the constitutional provision in operation.

*Ex parte Morgan*, 20 Fed. Rep. 298, is an instructive, interesting and leading case upon the law of extradition. Upon a requisition of the principal chief of the Cherokee Nation for the surrender of Frank Morgan, the Governor of Arkansas issued his executive warrant. Morgan having been arrested upon the warrant, applied to the United States District Court for a writ of *habeas corpus*. The court gave a very able review of the provisions, both of the Constitution and of the act of Congress, and held that an Indian Tribe was not either a State or Territory within the meaning of the law regulating extradition of fugitives from justice. The court in part said:

"I have no concern with the morality or public policy of this case. From the state of the case, I am called on to consider it from a purely legal standpoint, and to view it as a naked, simple legal question. It is true that in the construction of a law, where there is doubt as to the purpose to be subserved by the law maker, we may take into consideration an existing condition of affairs, and the demands of public policy as to such affairs. But, in a case of this kind, the chief executive of a State cannot act on grounds of public policy? His power, and his only power, under the law as it now stands, to extradite a person from his State, must be found in the Constitution and Laws of the United States. If it is not there it does not exist. Not only the power, but the manner of its exercise, is based exclusively on the Constitution of the United States, and the Law of Congress passed in pursuance thereof.

"Interstate extradition is regulated by law. No such power can ever be exercised by the chief executive of a State on the ground of comity. Rorer, *Interstate Law*, 225. Nor has it ever been in this country, properly and legally exercised on such ground. Comity may and does afford a strong reason for the enactment of laws providing for the extradition of criminals, that they may be brought to justice, and

society be thus protected. But we must look to the law for the right to exercise this extraordinary power. Even before our present form of government came into existence we find a number of the colonial plantations entering into a compact in the nature of a treaty for the extradition of fugitive criminals. If it could be done upon comity alone why enter into a compact. As early as 1643 the plantations under the Government of Massachusetts, the plantations under the Government of New Plymouth, the plantations under the Government of Connecticut and the Government of New Haven, and the plantations in combination therewith, pledged themselves to each other to render to the colony from which he escaped the fugitive from justice, and they prescribed the means to be employed in such rendition."

*Evasions of the non-comity doctrine.*—Notwithstanding the fact that each officer takes an oath to support the Constitution of the United States, and that of his own State, and to perform the duties of his office to the best of his ability; and the fact that his duties are due to the Commonwealth, and the people of the jurisdiction for which he is elected or appointed, it is but common practice for officials of separate and distinct jurisdictions to co-operate with each other, to affect the extradition of alleged fugitives; regardless of the fact as to whether or not a proper showing is made. The excuse given is that if favors are not extended, they will not be reciprocated.

Frequently, Governors who are less versed in organic law and personal rights than in political tactics, and who regard constitutional safeguards as trifles and technicalities unworthy of their consideration, grant extradition warrants as a matter of form. The fact that sufficient cause does not appear in the requisition, to them is a matter of indifference.

It is the duty of the Governor to administer the laws and guard the liberties of the people of his State. He takes no more judicial notice of the laws of a sister State; nor has he any more interest in their enforcement, than has a private individual. He is not authorized to assume that any individual within his territorial jurisdiction has previously committed a crime within the territory of a sister State and fled therefrom. In this respect his official knowledge is limited, in the first instance, to the proof made by the requisition and its accompanying documents; and then, if a hearing is granted, to all the legitimate evidence presented. The proceedings being purely statutory, the provisions of the act of Congress in relation thereto must be strictly followed. Unless this be done, an extradition warrant cannot be granted without violating the constitutional requirement that *no person shall be "deprived of life, liberty or property without due process of law."*

A mistaken idea of official ethics sometimes cause prosecuting attorneys to co-operate with those of other States in extradition proceedings. Between prosecuting attorneys of the same State there should be co-operation; for they are elected to enforce its laws; but as to those of other States, no such right or reason exists. In fact there should exist that degree of antagonism which would prompt each public prosecutor to resist any unlawful or unreasonable attack on the liberty of any individual whom he is elected to represent.

A misconception of official duty often causes police officers to make complaints under oath, for the arrest of an alleged fugitive, even

though their only knowledge be obtained through telegrams or letters received from the police of other cities; or after arrest is made to exert their ingenuity to avoid or defeat writs of *habeas corpus*; or to hasten the removal of the prisoner beyond the State line.

*The Governor of a State may refuse to issue an extradition warrant, and in such case there is no power to coerce him.*—At the October term, 1859, of the Woodford Circuit Court, in the State of Kentucky, Willis Lago, a free man of color, was indicted for enticing away a slave. Lago having escaped to Ohio, the Governor of Kentucky made a demand upon the Governor of Ohio for the surrender of Lago, which was refused. An application was then made to the Supreme Court of the United States for a rule on the Governor of Ohio to show cause why a *mandamus* should not issue, commanding him to cause Willis Lago to be delivered up and removed to the State of Kentucky. The case was argued, and at the December term, 1860, the application was overruled. In closing his opinion Chief Justice Taney said:

"But if the Governor of Ohio refuses to discharge this duty there is no power delegated to the General Government, either through its judicial department or any other department, to use any coercive means to compel him." *Kentucky v. Dennison*, 24 How. 66.

*Interstate extradition is not an unqualified right.*—The provisions of the Constitution of the United States, and of the act of Congress, in relation to extradition, do not give the demanding State any superior claims over the State on whom the demand is made. So decided by the Supreme Court of the United States in *Taylor v. Taintor*, hereafter reviewed.

In *Ex parte Hobbs*, 32 Tex. Cr. Rep. 312, 22 S. W. Rep. 1035, 40 Am. St. Rep. 782, the relator had been extradited to the State of Alabama, to be tried upon a charge of murder. He escaped, and returned to Texas. An *alias* extradition warrant was issued, and an effort to arrest him being made, he resisted, wounding a man. He was arrested for this latter offense. Upon writ of *habeas corpus* he demanded his release, upon the ground that the process was illegal, and the resistance lawful. *Held*, that the process was lawful; but that he must first answer to the accusation against him in Texas; and that when the State of Texas had no further claim upon him, he should be delivered up to the State of Alabama. As the extradition warrant was for a capital offense, bail in the meantime was to be denied.

In *Allen v. State*, 2 Humph. 285, another phase of this subject was passed upon. A defendant to a criminal case in Tennessee, who was upon bail, was carried out of the State of Tennessee upon an extradition warrant issued by the Governor of Tennessee. His bail bond was afterwards forfeited and judgment rendered thereon. The matter being taken to the Supreme Court of that State it was held that, as he was carried out of Tennessee by the order of the Governor of that State, his bail was exonerated; but the court held that the Governor of Tennessee would have been justified in refusing his surrender to the authorities of Alabama.

Whether one who is under arrest upon civil process is subject to arrest upon an extradition warrant is a disputed question. In the *Matter of Bristol*, 51 How. Prac. 422, and in *Troutman's Case*, 4 Zab. (N. J.) 634, it is held that he is not; but in *Ex parte Rosenblatt*, 51 Cal.

285, and *In re Harriott*, 18 R. I. 12, 25 Atl. Rep. 349, it is held that he is subject to such warrant.

*Extradition proceedings against persons who are necessary witnesses in criminal cases pending in the State on which the demand for surrender is made.*—It certainly was not contemplated by those who drafted the constitutional provisions, or enacted the laws of Congress, relating to the extradition of fugitives from justice, that any State should be required to surrender a person, whose evidence is necessary to maintain the prosecution of a criminal case, pending in that State. To require the surrender of such witness would be to interfere with the course of justice, to obstruct and hinder the prosecution of a criminal case, and to defeat that which extradition laws are enacted to promote. With equal force this exception applies to witnesses for the defense; for, to issue an executive warrant, and carry a witness for the defense beyond the jurisdiction of the State, would be a forcible denial of the defendant's constitutional rights to a fair trial and to have process for his witnesses.

This proposition is axiomatic and needs no authority for its support. We have only one case in mind bearing upon the subject which editorially appeared in the *Chicago Law Journal*, of August 7, 1903, as follows:

"A question of more than usual interest has arisen in the *habeas corpus* case of E. E. Farley now pending before Judge Chetlain in the Criminal Court, Mr. Farley having been arrested upon an extradition warrant issued by the Governor of this State.

"On June 16th, Mr. Farley won, and was paid, a prize upon a horse race at Detroit; but it being rumored, several days afterwards, that his horse was registered by a false name; and he not explaining the matter to the entire personal satisfaction of 'Judge' Murphy, of the Detroit Jockey Club, he was permanently ruled off the track; which means an exclusion from all race tracks controlled by the Western Jockey Club.

"Mr. Farley returned to Chicago, burdened with more leisure time than was consistent with his natural activity, which resulted in his employing counsel and commencing a crusade against the managers and bookmakers of Washington Park, causing many and frequent arrests to be made, for violation of the gambling laws of this State.

"News of the misfortunes of their Chicago brethren, reaching the members of the Detroit Jockey Club, inspired them with a righteous desire to sustain the dignity of the law by instituting proceedings against Mr. Farley, under the gamblers' protective act of Michigan, declaring it to be a crime to register a horse under a false name; accordingly, one of their trustees commenced criminal proceedings on July 21st before a Detroit justice of the peace as a basis for an extradition warrant.

"When the matter was called up upon Thursday last, before Judge Chetlain, Assistant State's Attorney Barnes informed the court that he believed that the prosecution in Detroit was instituted for the purpose of defeating the prosecutions commenced by Mr. Farley in this State; and that while he (Mr. Barnes) had no desire to interfere between the people of the State of Michigan and Mr. Farley, he objected



to any extradition of Mr. Farley until all of the cases pending in this county, that were instituted at the instance of Mr. Farley, are disposed of; for the reason that Mr. Farley was possessed of a great amount of information as to the facts connected with those cases and would be of great assistance to the State's Attorney's office in the prosecution of the cases, not only as a witness but as to general information regarding the peculiar features of each case.

"This is perhaps the first time that the question has arisen in the courts of Cook County, but it is by no means a new one; for it has been frequently held that the extradition of a fugitive must depend upon the circumstances of the case, and that it is not contemplated by the Federal Law that the rights of the demanding State shall be superior to those of the State upon whom the demand is made. A very interesting case is the *Matter of Bristoe*, 51 How. Prac. 422, where it was held that an arrest upon a *capias* issued in a civil case would prevent the subsequent service of an extradition warrant, the court saying 'that the National Constitution only imposes the duty of surrender when the laws of the State upon which the demand is made, have no claims upon the person of the fugitive.' This decision is borne out by the Supreme Court of the United States in *Taylor v. Taintor*, 16 Wall. 366, where it was said: 'Where a demand is properly made by the Governor of one State upon the Governor of another, the duty to surrender is not absolute and unqualified. It depends upon the circumstances of the case. If the laws of the latter State have been put in force against the fugitive, and he is imprisoned there the demands of those laws may first be satisfied. The duty of obedience then arises and not before.' In this latter case it was held that a bail bond given in Connecticut was liable to forfeiture; even though in the meantime the defendant had gone to his home in the State of New York and was from there extradited to Maine, and tried and sentenced to the penitentiary; the court holding that the bondsman should have followed him into New York and resisted the extradition proceedings.

"If the right to have one extradited is not unqualified, and must depend upon the circumstances of the case and only imposes a duty of surrender when the laws of the State upon which the demand is made has no claim upon the alleged fugitive, then it is eminently proper that the State's Attorney should vigorously resist the extradition of any person who is particularly valuable to the prosecution of a criminal case under charge of such State's Attorney; for otherwise persons who are witnesses, or possessed of important information of great assistance to the prosecuting attorney in serious criminal cases might be dragged into another State upon an extradition warrant and detained there on some trivial offense until the ends of justice were defeated. And when, as in the case of Mr. Farley, the extradition is brought evidently for that purpose, a remonstrance upon the part of the State's Attorney, even though it be for a permanent discharge of the prisoner, is consistent with the dignity of his office; for any attempt made in another State through process in that State to paralyze the arm of justice in this State should meet its just rebuke."

In the *Farley Case*, Judge Chetlain granted several continuances,

and then when the Cook County cases were disposed of, remanded the relator into the custody of the sheriff for extradition. He was taken to Detroit and placed upon trial, but was acquitted by the jury.

*The power and the practice.*—The basic authority for interstate extradition is undoubtedly a creation of the Constitution; but as this is held to be a latent power, which required an act of Congress to make operative, both must be considered together. No interstate extradition is permissible, unless the facts are clearly within the scope of the power created by the Constitution, and the proceedings in strict conformity with the provisions of the act of Congress.

*The power—What are extraditable crimes?*—The Constitution defines extraditable crimes as follows: "Treason, felony or other crime." Applying the well-known rule of statutory construction that if in a penal statute, general words follow an enumeration of particular cases, such general words only apply to cases of the same kind as those specially named, would exclude petty misdemeanors from the list of extraditable crimes; but the Supreme Court of the United States has held that the constitutional provision includes all crimes. *Kentucky v. Dennison*, 24 How. 66.

*The power—Who is a fugitive from justice?*—In this regard the language of the Constitution is "a person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State." A strict construction of this language would confine interstate extraditions to those who, after being charged with crime, "shall flee from justice." This, however, has not been the practice.

The subject as to who are fugitives from justice is considered in *Hyatt v. People* and *In re Tod*, both in the present volume.

*The practice—How charged.*—The act of Congress requires that a copy of an indictment found, or of an affidavit made before a magistrate, etc., shall accompany the requisition.

In *Ex parte Hart*, 11 C. C. A. 165, 25 U. S. App. 22, 63 Fed. Rep. 249, 28 L. R. A. 801 (reviewed in 10 Am. Crim. Rep., pp. 308-310), the United States Court of Appeals held that this provision of the act of Congress limits interstate extradition to cases where the accused had been charged by indictment or by affidavit before a magistrate charging an offense; and that it has no application to those cases where the prosecution is based upon an information made by a public prosecutor; for although a State has a right to establish its own methods of criminal procedure, if it desires to avail itself of the benefits of the extradition laws it must conform to the act of Congress.

*The practice—Affidavit.*—The copy of the affidavit that accompanies the requisition should be a copy of an affidavit which is made in due conformity with law. The affidavit should be an accusation, in the same sense that an indictment is. The affidavit should be the basis of the prosecution on which extradition is demanded.

In Michigan a complaint is a necessary prerequisite to a preliminary examination; but such complaint need not be in writing or sworn to. This oral complaint is the basis for an oral examination of the complainant or any other witness, from whose evidence the magistrate determines as to whether there is cause for a warrant to issue. The warrant may issue for a crime of a different name or class than that



complained of, yet the warrant is valid for it is based on the oral testimony. *People v. Kuhler*, 93 Mich. 626; *People v. Evans*, 72 Mich. 385; *Stuart v. People*, 42 Mich. 255; *Yaner v. People*, 34 Mich. 286; *Turner v. People*, 33 Mich. 363.

When extradition proceedings are desired it is the practice in Michigan to reduce the complaint to writing and cause it to be sworn to, that it may take the form of an affidavit; but is it in fact an affidavit legally charging the alleged fugitive from justice with crime?

The same condition probably exists in several other States, but it is unnecessary to follow the matter further at this time. When it is practicable in point of time the safer method is to procure an indictment and base the extradition proceedings on that.

*The practice—The affidavit charging the accused must be clear and fully charge a crime.*—In *People ex rel. Laurence v. Brady*, 56 N. Y. 182, the court directed the discharge of one arrested upon an extradition warrant, because the affidavit charging conspiracy was insufficient in matters of substance. In the opinion, speaking of the relator's rights, the court said:

"He is entitled, in common with all citizens, to such protection as the law gives to all, and, while the reversal of the proceedings may lead to the escape of an offender, we cannot close our eyes to the fact that criminal prosecutions for false pretences are often perverted to the accomplishment of personal and private ends. It would be a dangerous precedent if it should be held that a man could be deprived of his liberty and removed to another State upon an accusation so vague and unsatisfactory as is contained in the affidavits in this case. It is a reasonable rule, supported by obvious considerations of justice and policy, that when a surrender is sought upon proof, by affidavit, of a crime, the offense should be distinctly and plainly charged. Security to personal liberty demands this, and the State will meet the full measure of its obligations under the Federal Constitution, if it requires this before consenting to the arrest and removal of alleged offenders."

*The extradition warrant.*—The extradition warrant must show upon its face the cause for extradition.

In *State v. Richardson*, 34 Minn. 115, 24 N. W. Rep. 354, the relator was discharged by writ of *habeas corpus* because the executive warrant stated that the alleged fugitive stands charged "by complaint in the County of Minnehaha, in the Territory of Dakota, with crime," etc. The court held that such statement did not amount to a statement that he was charged by affidavit.

In the case of *In re Jackson*, 2 Flippin, 183, the relator was discharged because of insufficiency of executive warrant. The warrant recited that the Executive of Massachusetts "has by letters under his hand and made patent by the great seal of the State, represented to me that one Samuel D. Jackson has fled from justice in said State of Massachusetts."

The court held that before an extradition can be granted it must be shown that the accused fled from justice and that this could not be shown by the certificate of the Governor of the demanding State, but must appear by legitimate evidence. The court said:

"The evidence that the person has fled from justice must not only be satisfactory to the Governor, but must be legally sufficient before

the executive authority can be exercised. He cannot act upon rumor, nor upon the mere representation of a person, nor upon the demanding Governor's certificate. It should be sworn evidence, such as will authorize a warrant of arrest in any other case."

In the case of *In re Doo Woon*, 18 Fed. Rep. 898, the relator was discharged by writ of *habeas corpus* from an arrest under an extradition warrant. In closing the opinion the court said:

"In the argument the point was made by counsel for the prisoner that it does not appear from the warrant that the requisition from the Executive of California was accompanied by 'a copy of an indictment or affidavit' charging the prisoner with the commission of the crime charged therein, or any other, as required by section 5278, of the Revised Statutes. The right of one State of the Union to demand from another the delivery of a person who has fled from justice depends upon the Constitution of the United States (article 4, § 2), and the mode of proceedings and the evidence necessary to support such demand is prescribed by the statute of the United States. Sections 5278, 5279, Rev. Stat. Consequently, this is a case arising under the Constitution and laws of the United States, and in which the prisoner is in custody under order or by color of the authority of the United States, and therefore this court has jurisdiction. The Executive of this State, in allowing the requisition of the Executive of California, acts under the authority of the United States statute, and must conform to its directions and limitations. *Kentucky v. Dennison*, 24 How. 66. One of these is that before he can allow a warrant of extradition he must be furnished with a copy of an indictment or affidavit charging the person demanded with the commission of a crime against the laws of California. Without this he has no jurisdiction. A case for the exercise of his authority in this respect is not presented, and so far does not exist. And the warrant must bear upon its face the evidence that it was duly issued, and therefore, unless it recites or sets forth the indictment or affidavit upon which it is founded, it is illegal and void. *Ex parte Smith*, 3 McLean, 121; *Ex parte Thornton*, 9 Tex. 635. The removal of a person from one State, as a fugitive from justice, is a matter of the highest importance and cannot be made upon less evidence of the party's guilt and flight than would authorize a warrant and arrest in an ordinary case. And this, both by the Constitution of the United States and of this State, is nothing less than information on oath, which gives probable cause to believe that the person demanded has committed a particular crime against the law of the State making the demand, and that he has fled therefrom on that account.

"The caption and detention of the prisoner are clearly illegal and void, and he must be discharged therefrom, and it is so ordered."

For other phases of the law of extradition, and for a more complete list of authorities, the reader is referred to the cases reported in the present volume, the Table of Topics in the present volume, and also to the following books of reference:

23 Century Digest, columns 277 to 344.

7 Am. & Eng. Ency. of Law (1st ed.), pp. 598 to 657.

12 Am. & Eng. Ency. of Law (2d ed.), pp. 590 to 608.

8 Ency. of Pl. & Pr., pp. 798 to 827.

*Too little attention is given to the study of the law of extradition. Technical knowledge of its doctrines and requirements not only tends to guard the citizen against imposition, but to prevent fatal errors in proceedings where just cause exists.*

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RUHSTRAT v. PEOPLE.

185 Ill. 133—76 Am. St. Rep. 30—49 L. R. A. 181—57 N. E. Rep. 41.

Opinion filed April 17, 1900.

FLAG ACT: CONSTITUTIONAL LAW: *Concerning the right to use the United States Flag as an advertising medium.*

1. The exercise of police power by the legislature is limited to enactments tending to promote the public health, morals, safety or general welfare.
2. It is for the legislature to determine when an exigency exists for the exercise of police power, but what is the subject of such exercise is a judicial question.
3. The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights or liberties of a citizen.
4. The legislature is not the sole judge as to what is a reasonable or just restraint upon the right of a citizen to pursue his own calling and to exercise his own judgment as to the manner of conducting and advertising his business.
5. The term "liberty," as used in the Bill of Rights in the Constitution, includes the right of every citizen to choose and follow a particular business and to conduct and advertise it in any legitimate manner, subject only to the restraints necessary to secure the common welfare.
6. The use of the likeness of the National Flag upon a label or trade-mark for advertising purposes cannot be regarded as an act which is harmful in itself.
7. The use of the likeness of the National Flag for trade-marks and labels has been sanctioned by the Federal authorities in charge of the enforcement of the trade-mark laws, and the absence of Congressional prohibition thereof has created a "privilege" which citizens of the United States may enjoy free from State interference.
8. The Flag Law of 1899 (Laws of 1899, p. 234), is unconstitutional, not only as infringing upon the personal liberty guaranteed by the Constitution, but as depriving citizens of the United States of a "privilege" in contravention of section 1, of the Fourteenth Amendment to the Federal Constitution.

WILKIN and CARTER, JJ., and CARTWRIGHT, C. J., dissenting.

Writ of error to the Criminal Court of Cook County; Hon. Jonas Hutchinson, Judge, presiding.

The plaintiff in error was prosecuted and convicted for viola-

tion of an act of the Legislature of Illinois, entitled "An act to prohibit the use of the National Flag or Emblem for any commercial purposes or as an advertising medium," approved April 22, 1899, in force July 1, 1899. Laws Ill. 1899, p. 234. The following is a copy of the act in question:

"Section 1. It shall be unlawful for any person, firm, organization or corporation to use or display the National Flag or Emblem, or any drawing, lithograph, engraving, daguerreotype, photograph or likeness of the National Flag or Emblem, as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character or for any other purpose intended to promote the interests of such person, firm, corporation or organization.

"Sec. 2. Nothing in this act shall be construed as affecting either public or private exhibitions of art, or shall in any way restrict the use of the National Flag or Emblem for patriotic purposes.

"Sec. 3. All prosecutions under the provisions of this act shall be brought by any person in the name of the People of the State of Illinois, against any person or persons violating any of the provisions of this act, before any justice of the peace of the county in which such violation is alleged to have taken place, or before any court of competent jurisdiction; and it is hereby made the duty of the State's Attorney to see that the provisions of this act are enforced in their respective counties, and they shall prosecute all offenders on receiving information of the violation of any of the provisions of this act, and it is made the duty of the sheriffs, deputy sheriffs, constables and police officers to inform against and prosecute all persons whom there is probable cause to believe are guilty of violating the provisions of this act. One-half of the amount recovered in any penal action under the provisions of this act shall be paid to the person filing the complaint in such action, and the remaining one-half to the school fund of the county in which the said conviction is obtained.

"Sec. 4. All prosecutions under this act shall be commenced within six months from the time such offense was committed, and not afterwards.

"Sec. 5. Any persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction, shall

be punished by a fine of not less than \$10 nor more than \$100 and costs, and in default of payment of said fine and costs imposed shall be imprisoned in the county jail at the rate of one day for each dollar of fine and costs imposed."

Plaintiff in error, A. Ruhstrat, and his partner, Allen S. Curlett, are co-partners under the firm name of Ruhstrat & Curlett in the wholesale and retail cigar business in the city of Chicago. They used pictures of the National Flag upon cigar-box labels for the purpose of advertising and selling certain brands of their cigars by means of such advertisement. Plaintiff in error was arrested for a violation of said act, and on trial before a justice of the peace, was fined \$50 and costs. He took an appeal to the Criminal Court of Cook County, and, upon trial of the case in the latter court, he was found guilty and fined \$10. Motions for a new trial and in arrest of judgment were made and overruled. Judgment was rendered upon the findings of the court, a jury having been waived, and plaintiff in error was fined \$10 and costs. The present writ of error is prosecuted from this judgment of the Criminal Court of Cook County. Specimens of the labels used by the plaintiff in error upon his cigar boxes are in the record. One of these labels is a pictorial representation, with a female head in the center and a picture of the American Flag in the upper left-hand corner. Another of the labels is a pictorial representation, with the likeness of Nansen, the explorer, in the center of a wreath, around one side of which is entwined an American Flag. Another label is a pictorial representation, with a likeness of President Lincoln in the center, and a view of the Capitol building at Washington in the distance, and upon the right hand of the representation is a picture of the American Flag. Still another label is a pictorial representation, with a female figure in the center, holding in her right hand a shield containing upon it a picture of the American Flag. The plaintiff in error, upon the trial below, submitted to the court, to be held as law in the decision of the case, certain propositions to the effect that the act in question was illegal and void, as being in violation of the Constitutions of the State of Illinois and of the United States. These propositions were refused, and exception was taken to the refusal of the same. The reasons assigned in support of the motions for a new trial and in arrest of judgment

were also the alleged invalidity of the act as being in conflict with the Illinois and Federal Constitutions.

*Hofheimer & Pflaum*, for the plaintiff in error.

*Charles S. Deneen*, State's Attorney, and *F. L. Barnett*, Assistant State's Attorney, for the People.

Mr. Justice Magruder delivered the opinion of the court.

The provisions of the Constitution of Illinois which the terms of the act of April 22, 1899, known as the "Flag Law," and alleged to contravene, are sections 1, 2, and 4 of article 2 and section 22 of article 4. Section 1 of article 2 is as follows: "All men are by nature free and independent, and have certain inherent and inalienable rights. Among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, Governments are instituted among men, deriving their just powers from the consent of the governed." Section 2 is as follows: "No person shall be deprived of life, liberty or property without due process of law." Section 4 of the same article provides that "every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that liberty," etc. Section 1 of article 14 of the Amendments to the Constitution of the United States is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The expression, "life, liberty, and the pursuit of happiness," is general in its character, and includes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of "liberty." The happiness here referred to may consist in many things or depend on many circumstances, but it unquestionably includes the right of the citizen to follow his individual preference in the choice of an occupation. Black, Const. Law, p. 404. "The right of every man to choose his own



occupation, profession, or employment, though not expressly guarantied by the Constitutions, is included in the right to the pursuit of happiness." *Id.*, p. 411.

In *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. Ed. 253, the general proposition that the enjoyment by the citizen, upon terms of equality with all others in similar circumstances, of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is a general part of his rights of liberty and property as guarantied by the Fourteenth Amendment, was assented to by the Supreme Court of the United States as embodying a sound principle of constitutional law. In the latter case it was also held that, although the power and discretion which a State Legislature has in the matter of promoting the general welfare and of employing means to that end are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty, and property. In *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832, it was said: "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such in the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights, and that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." It was also said in this case that "the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." It was also there said: "If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers, which, as already intimated, is a material part of the liberty of the citizen." *Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585. In *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E.



Rep. 62, 22 L. R. A. 340, we said (page 71, 147 Ill., page 63, 35 N. E. Rep., and page 342, 22 L. R. A.): " 'Liberty,' as that term is used in the Constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare." *Froerer v. People*, 141 Ill. 171, 31 N. E. Rep. 395, 16 L. R. A. 492; *Commonwealth v. Perry*, 155 Mass. 117, 28 N. E. Rep. 1126, 14 L. R. A. 325; *People v. Gillson*, 109 N. Y. 389, 17 N. E. Rep. 343; *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 1 Abb. U. S. 388, Fed. Cas. No. 8,408; *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *Goodcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. Rep. 354; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. Rep. 285, 6 L. R. A. 621.

The plaintiff in error was engaged in the wholesale and retail cigar business. This was certainly a lawful and respectable business. Under the authorities referred to and under the interpretation of the Constitution there made, plaintiff in error had not only the right to choose the business in which he was engaged as his occupation, but he had the right to pursue and carry on that business in any way and by any methods which were lawful and proper. Included in "the right to choose one's occupation is the right to be free from unlawful interference or control in the conduct of it." Black, Const. Law, p. 412. In these days of commercial enterprise, advertising is an important factor in business pursuits. It cannot be denied that the plaintiff in error had a right to advertise his business in any legitimate manner, so as to attract the attention of the public. Nor can it be denied that the plaintiff in error had the right to design and make use of a trade-mark. The use of trade-marks is as old as commerce itself. The conventional trade-mark is a part of what is called "the symbolism of commerce." Browne, Trade-Marks (2d ed.), §§ 1, 26. It is allowable to use a picture as a trade-mark, and a picture made up of many objects in many colors may be a trade-marke. *Id.*, §§ 258, 259. Browne, in his work on Trade-Marks (section 265), says: "Color may be of the essence of a mark of manufacture or commerce, known as a

'trade-mark.' National Flags are sometimes blended with other objects to catch the eye. They are admirably adapted to all purposes of heraldic display, and their rich, glowing colors appeal to feelings of patriotism, and win purchasers of the merchandise to which they are affixed. . . . One flag printed in green may catch the eye of a son of the Emerald Isle. . . . Another flag, with stars on a blue field and stripes of alternate red and white, may secure a preference for the commodity upon which it is stamped." The right of the citizen to pursue the calling which he has chosen, and to advertise his business in a legitimate way by the use of labels or trade-marks, is not improperly exercised by making a picture of the National Flag a part of such labels or trade-marks, unless thereby the public safety, welfare, or comfort is interfered with.

It is claimed on the part of the People that the Flag law in question was enacted by the State Legislature in the exercise of its police powers. The law is justified upon the alleged ground that it is an enactment under and by virtue of the police power of the State, and that, being enacted under and by virtue of that power, the courts cannot exercise a supervision over the wisdom and judgment of the Legislature in its passage. It is claimed that the law tends to elevate the morals and promote the welfare of the public, and that, as such, it is a valid exercise of legislative power. The police power is limited to enactments which have reference to the public health or comfort, the safety or welfare of society. Laws which impose penalties on persons and interfere with the personal liberty of the citizen cannot be constitutionally enacted, unless the public health, comfort, safety, or welfare demands their enactment. It is for the Legislature to determine when an exigency exists for the exercise of this power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when measures adopted by the Legislature are calculated to protect the public health and secure the public comfort, safety, or welfare; but the measures so adopted must have some relation to the ends thus specified. *Ritchie v. People*, 155 Ill. 98, 40 N. E. Rep. 454, 29 L. R. A. 79. The Legislature has no power, under the guise of police regulations, to arbitrarily invade the personal

rights and personal liberty of the individual citizen. Its determination upon this question is not final or conclusive. If it pass an act ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the act, and see whether it relates to the objects which the exercise of the police is designed to secure, and whether it is appropriate for the promotion of such objects. When the police power is exerted for the purpose of regulating a useful business or occupation, and the mode in which that business may be carried on or advertised, the Legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment. Tied. Lim., § 3; *In re Jacobs*, 98 N. Y. 108; *People v. Gillson*, *supra*; *Cooley*, Const. Lim. (6th ed.), pp. 606, 607, 744; *Ex parte Whitwell*, 32 Pac. Rep. 872, 98 Cal. 73, 19 L. R. A. 727; *Frorer v. People*, *supra*; *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; *Ritchie v. People*, *supra*. In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, it was said: "If, therefore, a statute, purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the Constitution." In *Eden v. People*, 161 Ill. 296, 43 N. E. Rep. 1108, 32 L. R. A. 659, we said (page 308, 161 Ill., page 1110, 43 N. E. Rep., and page 663, 32 L. R. A.): "If the act were one calculated to promote the health, comfort, safety, and welfare of society, then it might be regarded as an exercise of the police power of the State. In *Toledo, W. & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37, it was held that, if the law prohibits that which is harmless in itself, or requires that to be done which does not tend to promote the health, comfort, safety, or welfare of society, it will in such case be an unauthorized

exercise of power, and it will be the duty of the courts to declare such legislation void."

It is difficult to see how the Flag Law of April 22, 1890, tends in any way to promote the safety, welfare, or comfort of society. The use of a likeness of the flag upon a label or as part of the trade-mark of a business man in the lawful prosecution of his business cannot be regarded otherwise than as an act which is harmless in itself. It may violate the ideas which some people have of sentiment and taste, but the propriety of an act considered merely from the standpoint of sentiment and taste, may be a matter about which men of equal honesty and patriotism may differ. The act in question is severe in its terms. It makes it the duty of the State's Attorney to prosecute all persons guilty of a violation of the provisions of the act, and makes it the duty of sheriffs, deputy sheriffs, constables, and police officers to inform against all persons "whom there is probable cause to believe are guilty of violating the provisions of this act. One-half of the amount recovered in any penal action under the provisions of this act shall be paid to the person filing the complaint in such action, and the remaining one-half to the school fund of the county. . . . Any persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than \$10 nor more than \$100 and costs, and in default of payment of said fine and costs imposed shall be imprisoned in the county jail," etc. What is the offense for which these penalties are imposed? The using or displaying of the National Flag or Emblem, or any drawing or likeness of the same, "as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character, or for any other purpose intended to promote the interests of such person, firm, corporation, or organization" so using or displaying the same. Section 2 of the act provides that the use of the National Flag or Emblem for patriotic purposes shall not in any way be restricted. It is not altogether clear that a person might not make use of or display the National Flag or Emblem for a purpose intended to promote his own interests, and yet, at the same time, for an entirely patriotic purpose. It is not clear that the prohibition,

leveled against the use or display of the flag, tends in any way to elevate the morals or promote the welfare of the public.

The flag is used, in the prosecution of commerce, upon the high seas, as a symbol of nationality. The nationality of a ship is determined by the flag which it carries. A ship, navigating under the flag and pass of a foreign country, is to be considered as bearing the national character of the country under whose flag she sails. Under what is called in international law "the law of the flag," a shipowner who sends his vessel into a foreign port gives notice by his flag to all who enter into contracts with the shipmaster that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all. 1 Bouv. Law Dict. (Rawle's Rev.), pp. 799, 800. It is a doctrine of international law that a ship becomes hostile so soon as she hoists the enemy's flag; and, while the cargo of the ship does not necessarily take character from the flag, yet the general rule is that the goods under such flag follow the fate of the vessel. 11 Am. & Eng. Ency. Law, p. 480, note 3. It is difficult to see why, if, in the prosecution of foreign commerce or trade, the flag is used to protect a ship and cargo and designate its character, it should be a desecration of the same flag to use a likeness of it upon a label or trade-mark in the prosecution of domestic trade or business.

A flag is emblematic of the sovereignty of the power which adopts it. The American Flag is emblematic of the sovereignty of the United States. Congress, by sections 1791 and 1792 of the Revised Statutes of the United States, has provided as follows: "The Flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field. On the admission of a new State into the Union, one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding said admission." In *Collector v. Day*, 11 Wall. 113, 20 L. Ed. 122, it was said: "The General Government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate

sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment, 'reserved,' are as independent of the General Government as that Government within its sphere is independent of the States." The State of Illinois has never adopted a flag emblematic of its sovereignty. The flag is the flag of the United States as a sovereignty. The United States, acting through its Congress, has adopted a flag emblematic of national sovereignty. Presumably, the National Flag was adopted for the use of the citizens of the United States. There is a difference between the privileges and immunities belonging to the citizens of the United States as such, and those belonging to the citizens of each State as such. The privileges and immunities of citizens of the United States are those which arise out of the nature and essential character of the National Government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof; and it is these rights which are placed under the protection of Congress by the Fourteenth Amendment. *People v. Loeffler*, 175 Ill. 585, 51 N. E. Rep. 785; *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394. The right to use or display the flag would seem to be a privilege of a citizen of the United States, rather than the privilege of a citizen of any one of the States. The National Government, in the exercise of its inherent power to establish a flag or emblem symbolic of national sovereignty, has passed sections 1791 and 1792, above referred to, and has thereby taken jurisdiction of the subject-matter of a national flag, and has legislated upon it. Congress has passed no legislation restricting the use of the flag, or confining its use to any particular purpose. It would seem that, if it had been the intention of Congress to restrict or confine such use, some provision to that effect would have been embodied in the act prescribing and describing the National Flag.

The use of the Flag of the United States, as embodied in advertising sheets and placards and labels, and in common-law trade-marks, has received the unqualified approval of the whole commercial world. It has also received the sanction of those having in charge the execution of the trade-mark laws of the United States. The usage and practice of employing a flag for commercial purposes have been indulged in by citizens of the



United States with the knowledge of the National Government. The absence of Congressional prohibition against the usage and practice thus indulged in with the knowledge of the General Government has created a "privilege" in the citizen of the United States to continue such use until withdrawn by the competent authority. An act of legislation, passed by a particular State, which deprives the citizen of such privilege, contravenes that clause of the amendment to the National Constitution which forbids any State to abridge the privileges and immunities of a citizen of the United States. If the State Legislature can restrict the use of the National Flag, and permit its use for one purpose and prohibit its use for another purpose, it would have the right to prohibit its use altogether within the limits of the State. But it cannot be pretended that the State of Illinois has authority to prohibit the use of the National Flag altogether. It necessarily follows that it has no authority to prohibit its use for certain purposes. We are of the opinion that this law is unconstitutional, not only as infringing upon the personal liberty guarantied to the citizen by both the Federal and State Constitutions, but also as depriving a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, granted to him by the Federal Constitution.

The act is also unduly discriminating and partial in its character. It exempts from penalties imposed by the act persons who may choose to make use of the National Flag or Emblem for either public or private exhibitions of art. The exhibitor who engages in public or private exhibitions of art may do so, not merely for the public benefit, but for the promotion of his own interests. By thus excluding artists or exhibitors from the inhibitions of section 1 of the act, the act thereby creates a class or classes of persons who are exempted from the penalties embraced therein. Legislation of this kind has frequently been condemned by the courts in this country. The Legislature clearly has no power to deny to plaintiff in error the right to use the National Flag to advertise his business, or, in other words, to deny to all persons following particular occupations the right to use the National Flag, and at the same time to permit artists or art exhibitors to use the same. The manner in which the act thus discriminates in favor of one class of occupations and



against all others places it in opposition to the constitutional guaranties hereinbefore referred to. *Millett v. People*, 117 Ill. 294, 7 N. E. Rep. 631; *Ritchie v. People*, 155 Ill. 98, 40 N. E. Rep. 454, 29 L. R. A. 79.

For the reasons herein set forth, the judgment of the Criminal Court of Cook County is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

CARTWRIGHT, C. J., and WILKIN and CARTER, JJ., dissent.

NOTES (by J. F. G.).—While it is true that the American flag is frequently used for purposes foreign to those for which it was originally designed; and in particular, the display of it upon political posters, used as mediums by which rogues and demagogues secure popular favor, attain office, and in its shadow career in official corruption, yet the matter of control rests exclusively with Congress.

National emblems are created for National uses. In the military naval and civil departments of Government they have their uses and functions; and on the seas they are tokens of security to commerce. Flags, like National money, are often private property; but as emblems or tokens they are subject to National control as completely as the postal system or the management of the army or navy, free from any interference by State action or State legislation.

To the writer it seems that this should have been the sole question passed upon, and that, with a degree of brevity and force, that would discourage ill-advised legislation in the future.

To treat the minor phases with so much consideration, lends too much dignity to an act, which, although probably inspired with good intentions, contravenes one of the plainest principles of organic law.

## TERRITORY OF HAWAII v. MANKICHI.

190 U. S. 197—23 Sup. Ct. Rep. 787—47 L. Ed. 1016.

Decided June 1, 1903.

**HAWAII: Annexation—Retention of its laws—Its status in respect to criminal procedure—Indictment not presented by a grand jury—Verdict concurred in by nine of twelve jurors—Extensive review in three opinions.**

1. Although the common law of England was adopted in Hawaii by the Code of 1897, the statutes theretofore regulating criminal procedure in Hawaii were not repealed or abrogated. A trial

upon an indictment not presented by a grand jury, and a verdict rendered upon the concurrence of nine out of twelve jurors, will sustain a conviction.

2. The spirit or intention will prevail against the strict letter of the statute.

Appeal by the Territory of Hawaii to the Supreme Court of the United States from an order of the District Court of the United States in and for Hawaii Territory, directing the release of Osaki Mankichi by writ of *habeas corpus*. Argued March 4 and 5, 1903. Reversed.

Statement by Mr. Justice Brown:

This was a petition by Mankichi for a writ of *habeas corpus* to obtain his release from the Oahu convict prison, where he is confined upon conviction for manslaughter, in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict.

Following the usual course of procedure in the Republic of Hawaii, prior to its incorporation as a Territory of the United States, the prisoner was tried upon an indictment much in the form of an information at common law, by the *Attorney General*, and indorsed "a true bill, found this 4th day of May, A. D. 1899. A. Perry, first judge of the Circuit Court," etc.

From an order of the United States District Court, discharging the prisoner, the Attorney General of the Territory appealed to this court.

Messrs. *Edmund P. Dole* and Solicitor General *Richards*, for the appellant.

Messrs. *Frederic R. Coudert, Jr.*, *Paul Fuller*, *George A. Davis*, *F. M. Brooks*, and *Charles Fred Adams*, for the appellee.

Mr. Justice Brown delivered the opinion of the court:

The question involved in this case is an extremely simple one. The difficulty is in fixing upon the principles applicable to its solution. By a joint resolution adopted by Congress, July 7, 1898 (30 Stat. at L. 750), known as the Newlands Resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its Constitution, the Hawaiian Islands

and their dependencies were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The material parts of this resolution are printed in the margin.\* Though the resolution was passed July 7, the formal transfer was not made until August 12, when, at noon of that day, the American Flag was raised over the Government house, and the islands ceded with appropriate cere-

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\*Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (30 Stat. at L. 750).

Whereas, the Government of the Republic of Hawaii having, in due form signified its consent, in the manner provided by its Constitution, to cede, absolutely and without reserve, to the United States of America, all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government or Crown lands, public buildings or edifices, ports, harbors, military equipment and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

*Resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled*, that said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

Until Congress shall provide for the Government of such Islands, all the civil, judicial and military powers exercised by the officers of the existing Government in said Islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nation. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this Joint Resolution nor con-

monies to a representative of the United States. Under the conditions named in this resolution, the Hawaiian Islands remained under the name of the "Republic of Hawaii" until June 14, 1900, when they were formally incorporated by act of Congress under the name of the "Territory of Hawaii." (31 Stat. at L. 141, chap. 339.) By this act the Constitution was formally extended to these islands (§ 5), and special provisions made for empaneling grand juries, and for the unanimous verdicts of petty juries. (§ 83.)

The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the island, and to substitute immediately, and without new legislation, the common-law proceedings by grand and petit jury, which had been held applicable to other organized Territories (*Webster v. Reid*, 11 How. 437, 13 L. Ed. 761; *American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079, 17 Sup. Ct. Rep. 618; *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061, 18 Sup. Ct. Rep. 620), though we have also held that the States, when once admitted as such, may dispense with grand juries (*Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111, 292), and perhaps also allow verdicts to be rendered by less than a unanimous vote (*American Pub. Co. v. Fisher*, 166 U. S. 464, 41 L. Ed. 1079,

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trary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

17 Sup. Ct. Rep. 618; *Thompson v. Utah*, 170 U. S. 343, 42 L. Ed. 1061, 18 Sup. Ct. Rep. 620).

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the island prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized Government, and a system of jurisprudence modeled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted upon indictments found by judges. By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice should be instantly changed, and the criminal procedure embodied in the 5th and 6th Amendments to the Constitution be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands Resolution, adopting the municipal legislation of Hawaii, "not contrary to the Constitution of the United States," be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires (Amendment 5) that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury;" and (Amendment 6), that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed." But

there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the street of Bologna, the books are full of authorities to the effect that the intention of the law-making power will prevail, even against the letter of the statute; or, as tersely expressed by Mr. Justice Swayne in *Smythe v. Fisk*, 23 Wall. 374, 380, 23 L. Ed. 47, 49: "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." A parallel expression is found in the opinion of Mr. Chief Justice Thompson, of the Supreme Court of the State of New York (subsequently Mr. Justice Thompson of this court), in *People v. Utica Ins. Co.*, 15 Johns. 358, 381, 8 Am. Dec. 243: "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."

Without going farther, numerous illustrations of this maxim are found in the reports of our own courts. Nowhere is the doctrine more broadly stated than in *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278, in which an act of Congress, providing that if "any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier," was held not to apply to a State officer who held a warrant of arrest against a carrier for murder, the court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony. "All laws," said the court, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." A case was cited from Plowden, holding that a statute which punished a prisoner as a felon who broke prison did not extend to a prisoner



who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burned." Similar language to that in *Kirby's Case* was used in *Carlisle v. United States*, 16 Wall. 147, 153, 21 L. Ed. 426, 429.

In *Atkins v. Fibre Disintegrating Co.*, 18 Wall. 272, 21 L. Ed. 841, it was held that a suit *in personam* in admiralty was not a "civil suit" within the 11th section of the judiciary act, though clearly a civil suit in the general sense of that phrase, and as used in other sections of the same act. See also *Re Louisville Underwriters*, 134 U. S. 488, 33 L. Ed. 991, 10 Sup. Ct. Rep. 587. So in *Heydenfeldt v. Daney Gold & Silver Min. Co.*, 93 U. S. 634, 638, 23 L. Ed. 995, 996, it was said by Mr. Justice Davis: "If a literal interpretation of any part of it [a statute] would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment." To the same effect are the *Church of Holy Trinity v. United States*, 143 U. S. 457, 36 L. Ed. 226, 12 Sup. Ct. Rep. 511, in which many cases are cited and reviewed, and *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 36 L. Ed. 340, 345, 12 Sup. Ct. Rep. 517. In this latter case it was held that a statute requiring the permission of the Chinese Government, and the identification of "every Chinese person other than a laborer, who may be entitled by said treaty or this act [of Congress] to come within the United States," did not apply to "Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to re-enter it on their return to their business and their homes." Said the Chief Justice: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Two recent English cases are instructive in this connection: In *Plumstead Dist. Bd. of Works v. Spackman*, L. R. 13 Q. B. Div. 878, 887, it was said by the Master of Rolls, afterwards Lord Esher: "If there are no means of avoiding such an inter-



pretation of the statute" (as will amount to a great hardship), "a judge must come to the conclusion that the Legislature by inadvertence has committed an act of legislative injustice; but to my mind, a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the Legislature could have so intended." See also *Ex parte Walton*, L. R. 17 Ch. Div. 746.

Is there any room for construction in this case, or, are the words of the resolution so plain that construction is impossible? There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice, when such interference would result in imperiling the peace and good order of the islands. The main objects of the resolution were, 1st, to accept the cession of the islands theretofore made by the Republic of Hawaii, and to annex the same "as a part of the territory of the United States, and subject to the sovereign dominion thereof;" 2d, to abolish all existing treaties with various nations, and to recognize only treaties between the United States and such foreign nations; 3d, to continue the existing laws and customs regulations, so far as they were not inconsistent with the resolution, or contrary to the Constitution, until Congress should otherwise determine. From the terms of this resolution it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that, until further legislation, the Republic of Hawaii continued in existence. Even its name was not changed until 1900, when the "Territory of Hawaii" was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was Congress not to disturb the existing condition of things any further than was necessary, that it was provided (§ 5) that only "the laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory as elsewhere in the United States." There was apparently some discretion left to the courts in this connection. *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291, 299, 23 L. Ed. 898, 901. The fact, already mentioned, that

Congress, in this organic act, inserted a provision for the empaneling of grand juries and for the unanimity of verdicts, indicates an understanding that the previous practice had been pursued up to that time, and that a change in the existing law was contemplated.

Of course, under the Newlands Resolution, any new legislation must conform to the Constitution of the United States; but how far the exceptions to the existing municipal legislation were intended to abolish existing laws must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hitherto well known and acquiesced in left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it.

If the negative words of the resolution, "nor contrary to the Constitution of the United States," be construed as imposing upon the islands every provision of a Constitution which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian Islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial Government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely, such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws

according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making preparation. The Legislature of the Republic had just adjourned, not to convene again until some time in 1900, and not actually convening until 1901. The resolution on its face bears evidence of having been intended merely for a temporary purpose, and to give time to the Republic to adapt itself to such form of territorial government as should afterwards be adopted in its organic act.

The language of Mr. Buchanan, then Secretary of State, in holding that the military Government established in California did not cease to exist with the treaty of peace, but continued as a Government *de facto* until Congress should provide a territorial Government, is peculiarly applicable to this case. "The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing Government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." [*Cross v. Harrison*, 16 How. 184, 14 L. Ed. 897.

It is insisted, however, that, as the common law of England had been adopted in Hawaii by the Code of 1897, it was within the power of the courts to summon a grand jury, and that such action might have been taken and criminals tried upon indictments properly found, and convicted by a unanimous verdict. The suggestion is rather fanciful than real, since section 1109 of the Code of 1897, adopting the common law of England, contained a proviso that "no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." These laws provided expressly (section 616, Penal Laws of 1897) as follows: "The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding judge of a court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." The question thus squarely presented to every judge in the Republic was, whether he was bound to summon a grand

jury under the Newlands Resolution, when no provision existed by law for impaneling the same, or their payment, and when, in so doing, he was obliged to ignore the plain statute of his own country.

It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly, they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the Legislature and without process or confiscating private property for public use without compensation, remain in force after an annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.

Inasmuch as we are of opinion that the status of the islands and the powers of their provisional Government were measured by the Newlands Resolution, and the case has been argued upon that theory, we have not deemed it necessary to consider what would have been its position had the important words "nor contrary to the Constitution of the United States" been omitted, or to reconsider the questions which arose in the *Insular Tariff Cases* regarding the power of Congress to annex territory without, at the same time, extending the Constitution over it. Of course, for the reasons already stated, the questions involved in

this case could arise only from such as occurred between the taking effect of the joint resolution of July 7, 1898, and the Act of April 30, 1900, establishing the territorial Government.

*The decree of the District Court for the Territory of Hawaii must be reversed*, and the case remanded to that court, with instructions to dismiss the petition.

Mr. Justice White and Mr. Justice McKenna, concurring:

The court in its opinion disposes of the case solely by a construction of the act of Congress. Conceding, *arguendo*, that such view is wholly adequate to decide the cause, I concur in the meaning of the act as expounded in the opinion of the court, and, in the main, with the reasoning by which that interpretation is elucidated. I prefer, however, to place my concurrence in the judgment upon an additional ground which seems to me more fundamental. That ground is this: That as a consequence of the relation which the Hawaiian Islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the 5th and 6th Amendments of the Constitution concerning grand and petit juries were not applicable to that Territory, because whilst the effect of the resolution of annexation was to acquire the islands, and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian Islands into the United States, and make them an integral part thereof. In other words, in my opinion, the case is controlled by the decision in *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088, 21 Sup. Ct. Rep. 770.

The resolution of Congress annexing the islands, it seems to me, makes the conclusion just stated quite clear, and manifests that it was not intended to incorporate the islands *eo instanti*, but, on the contrary, that the purpose was, whilst acquiring them, to leave the permanent relation which they were to bear to the Government of the United States to await the subsequent determination of Congress. By the resolution the islands were annexed, not absolutely, but merely "as a part of the territory of the United States," and were simply declared to be subject to its sovereignty. The minutest examination of the resolution fails to disclose any provision declaring that the islands are in-

incorporated and made a part of the United States, or endowing them with the rights which would arise from such relation. On the contrary, the resolution repels the conclusion of incorporation. Thus it provides for the government of the islands by a commission to be appointed by the President, until Congress should have opportunity to create the Government which would be deemed best. Further, it is stipulated "until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged." And, if possible, to make the purpose of Congress yet clearer, the act provided that "the President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper." All these provisions, in my opinion, clearly point out that, whilst the purpose was to acquire and extend the sovereignty of the United States over the islands, it was proposed only to provide, by the resolution of annexation, a provisional Government until Congress should become possessed of the information necessary to enable it to determine what should be the permanent status of the annexed Territory. And the meaning of the resolution of annexation thus indicated by its terms is reflexly demonstrated by the act "To Provide a Government for the Territory of Hawaii," approved April 30, 1900, by which the islands were undoubtedly made a part of the United States in the fullest sense and given a territorial form of government. When the two acts are put in contrast and the declarations in the later act are considered, which were not found in the earlier act, and which, it is to be presumed, were intentionally omitted from the resolution providing for annexation, I can see no reason for holding that the mere act of annexation accomplished the result which was brought about by the subsequent law containing the more comprehensive provisions.

The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit



juries were not applicable to them. *Hurtado v. California*, 110 U. S. 516, 28 L. Ed. 232, 4 Sup. Ct. Rep. 111, 292; *Re Ross*, 140 U. S. 473, *sub nom. Ross v. McIntyre*, 35 L. Ed. 583, 11 Sup. Ct. Rep. 897; *Bolln v. Nebraska*, 176 U. S. 83, and cases cited on page 83, 44 L. Ed. 382, 20 Sup. Ct. Rep. 287; *Maxwell v. Dow*, 176 U. S. 584, 44 L. Ed. 597, 20 Sup. Ct. Rep. 448, 494; and *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088, 21 Sup. Ct. Rep. 770.

Nor is there anything in the provision in the act of annexation relating to the operation of the Constitution in the annexed Territory which militates against the conclusions previously expressed. The text of the resolution on this subject is as follows:

"The municipal legislation of the Hawaiian islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

Now, in so far as the Constitution is concerned, the clause subjecting the existing legislation which was provisionally continued to the control of the Constitution, clearly referred only to the provisions of the Constitution which were applicable, and not to those which were inapplicable. In other words, having, by the resolution itself, created a condition of things absolutely incompatible with immediate incorporation, Congress, mindful that the Constitution was the supreme law, and that its applicable provisions were operative at all times, everywhere, and upon every condition and persons, declared that nothing in the joint resolution continuing the customs legislation and local law should be considered as perpetuating such laws, where they were inconsistent with those fundamental provisions of the Constitution which were, by their own force, applicable to the Territory with which Congress was dealing.

To say the contrary would be but to declare that Congress had provided for the continuance of the tariff and other legislation, whilst, at the same time, it had enacted that that result should not be brought about. It would, moreover, lead to the assumption that provisions of the Constitution which were in-



applicable to the particular situation should yet govern and control that condition.

Mr. Justice McKenna authorizes me to say that he also concurs in the result for the foregoing reasons.

Mr. Chief Justice Fuller, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer, and Mr. Justice Peckham, dissenting:

In my opinion, the final order of the District Court should be affirmed.

Mankichi was tried on an information filed May 4, 1899, charging him with the commission of the crime of murder on March 26 of that year, and was found guilty of manslaughter in the first degree by the verdict of nine jurors. The statutes of Hawaii prior to July 7, 1898, provided for such trial and conviction.

July 7, 1898, the "Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States" was approved. 30 Stat. at L. 750. Surrender of sovereignty and possession was effected August 12, 1898.

The act "To Provide a Government for the Territory of Hawaii" was approved April 30, 1900. 31 Stat. at L. 141, chap. 339.

If Articles of Amendment 5 and 6 were applicable to the Territory of Hawaii after August 12, 1898, the district judge was right, and Mankichi was entitled to be discharged.

The annexation resolution contained three sections, and, omitting the 2d and 3d as not material here, is given in the margin.\*

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\*Whereas, the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its Constitution, to cede, absolutely and without reserve, to the United States of America, all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

By the specific language of this resolution no legislation which was contrary to the Constitution of the United States remained in force.

The language is plain and unambiguous, and resort to construction or interpretation is absolutely uncalled for. To tamper with the words is to eliminate them.

This is not one of those rare cases where adherence to the letter leads to manifest absurdity, as in *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278, and the illustrations there drawn by Mr. Justice Field from Puffendorf and Plowden.

The argument *ab inconvenienti*, without more, is an unsafe guide, and departure from the plain meaning tends to usurp legislative functions. Besides, that argument has no application here. Courts in Hawaii have had criminal law jurisdiction for more than half a century; and they had power to impanel a grand jury (*United States v. Hill*, 1 Brock, 159, Fed. Cas. No. 15,364), and to direct the petit jury of twelve that conviction could only be had by a unanimous verdict.

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*Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, that said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.*

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, that all revenue from, or proceeds of, the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local Government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands, for educational and other public purposes.

Until Congress shall provide for the Government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers, and fill the vacancies so occasioned.

The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Ha-

In giving the instructions which accompanied the joint resolution, Mr. Justice Day, then Secretary of State, under date of July 8, 1898, said: "These recitals, it will be observed, are made in the language of the treaty of annexation concluded at Washington on the 16th day of June, 1897. They, as well as the other terms of that treaty, were advisedly incorporated into the joint resolution, because they embodied the terms of cession, which have not only been agreed upon by the two Governments, but which have also been ratified by the Government of the Republic of Hawaii."

The reference is to a proposed treaty signed by Secretary Sherman on the part of the United States, and by three commissioners on the part of Hawaii, to which the advice and consent of the Senate was not given.

The preamble to this treaty expressed the "desire of the Government of the Republic of Hawaii that those islands should be incorporated into the United States as an integral part thereof

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Hawaiian Islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this Joint Resolution nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this Joint Resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall in no case exceed for million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

and under its sovereignty," and that the two Governments "have determined to accomplish by treaty an object so important to their mutual and permanent welfare."

The language of the remainder of the treaty is reproduced in the joint resolution, including the provision that the municipal legislation of Hawaii should remain in force when not inconsistent with the resolution or any existing treaty of the United States nor contrary to the Constitution of the United States.

By the resolution, Congress provided for the Government of Hawaii under the authority of the United States. All the civil, judicial, and military powers exercised by the officers in the islands were vested in the appointees of the President, and were to be exercised "in such manner as the President of the United States shall direct." The President prorogued the Legislature; reappointed the officers "of the Republic of Hawaii as it existed just prior to the transfer of sovereignty; required such officers to take an oath of allegiance to the United States; and required all bonded officers to renew their bonds to the Government of the United States."

All existing treaties of Hawaii were abrogated; further immigration of the Chinese was prohibited except as allowed "by the laws of the United States;" the customs laws of Hawaii, and its municipal legislation not contrary to the Constitution of the United States, were continued in force until Congress should otherwise determine.

Commissioners were to be and were appointed to recommend to Congress such legislation as they might "deem necessary and proper."

The act of April 30, 1900, was the result of their report, and provided further government, dealing with details, and permanent instead of temporary. But, while temporary under the resolution, it was nevertheless a system of government, and the Territory was under the sovereignty of the United States, and governed by its agencies.

By the resolution, the annexation of the Hawaiian Islands became complete, and the object of the proposed treaty, that "those islands should be incorporated into the United States as

an integral part thereof, and under its sovereignty," was accomplished.

The exceptions in respect of customs relations and the prohibition of the immigration of the Chinese, embodied in the treaty agreement and in the resolution, could not destroy the effect of incorporation or of the extension of the Constitution. If this were possible, the act of April 30, 1900, would be open to the same objection.

It was said at the bar that the words "contrary to the Constitution of the United States" were inserted as a declaration that certain "fundamental rights and principles, the basis of all free government, which cannot with impunity be transcended," were to be protected in Hawaii; that certain limitations of the Constitution applied "whenever the jurisdiction of the United States extends." But, in that view, the insertion of the phrase was superfluous and accomplished nothing.

Nor were we informed what those fundamental rights are. This is not a question of natural rights, on the one hand, and artificial rights on the other, but of the fundamental rights of every person living under the sovereignty of the United States in respect of that Government. And among those rights is the right to be free from prosecution for crime unless after indictment by a grand jury, and the right to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve.

In *Callan v. Wilson*, 127 U. S. 540, 549, 32 L. Ed. 223, 226, 8 Sup. Ct. Rep. 1301, it was said by Mr. Justice Harlan, speaking for the court: "And as the guaranty of a trial by jury, in the 3d article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the 6th Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and so far as the agencies of the General Government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property."

Common-law rights are described in the ordinance of 1787 as "fundamental principles of civil and religious liberty," and

the amendments embodying common-law rights were demanded, as the preamble of the act of Congress proposing them declares, "in order to prevent misconstruction or abuse" of the powers of the General Government.

Assuming, solely for the sake of argument, that the mere fact of annexation might not in itself have at once extended to the inhabitants of Hawaii all the rights, privileges, and immunities guaranteed by the Constitution, and that Congress had the power to impose limitations in that regard, I think not only that Congress did not do so in the particulars in question, but that, in re-enacting existing legislation, Congress, by the terms of the resolution, intentionally invalidated so much thereof as in these particulars was inconsistent with the Constitution. The presumptions are all opposed to any capitulation in the matter of common-law institutions.

Mr. Justice Harlan, dissenting:

This case is of such exceptional importance in respect of the principles announced by my brethren of the majority, that I deem it not inappropriate to state my views in a separate opinion.

I entirely concur with the Chief Justice in holding that the accused was properly discharged from custody. Whether the legality of his detention be tested by the Constitution or alone by the Joint Resolution of Congress, approved July 7, 1898, providing "for annexing the Hawaiian Islands to the United States," his imprisonment was, in my judgment, wholly unauthorized.

What, at the time of arrest and trial of the accused, were the relations existing between the United States and Hawaii? By what law were the personal rights of the people of Hawaii to be then determined? The decision of the case depends upon the answer to these questions.

In 1897 a treaty was made between the United States and the Republic of Hawaii, which was signed by Secretary Sherman on behalf of the United States, and by three Commissioners on the part of Hawaii. Senate Report No. 681, 55th Congress, 2d Sess., March 16, 1898.

The preamble to that treaty expressed the "desire of the



Government of the Republic of Hawaii that those Islands shall be *incorporated* into the United States *as an integral part thereof and under its sovereignty.*" It also recited the determination of the two Governments "to accomplish by treaty an object so important to their mutual and permanent welfare."

The treaty stipulated that, until Congress provided for the government of such Islands, all the civil, judicial, and military powers exercised by the officers of the existing Government in the Islands should be vested in such person or persons, and be exercised in such manner, as the President of the United States directed, and that the President should have power to remove said officers, and fill the vacancies so occasioned; also that the municipal legislation of the Hawaiian Islands "not inconsistent with this treaty *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

The treaty was not formally ratified, but its object was accomplished by the passage of the Joint Resolution of July 7, 1898. 30 Stat. at L. 750.

In order that the full scope of that Resolution may be seen, it is here given in full:

"Whereas, the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its Constitution, to cede absolutely and without reserve to the United States of America *all rights of sovereignty of whatsoever kind* in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are



subject to the sovereign dominion thereof, and that, all and singular, the property and rights hereinbefore mentioned are vested in the United States of America.

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local Government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

"Until Congress shall provide for the government of such Islands, all the civil, judicial, and military powers exercised by the officers of the existing Government in said Islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

"The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this Joint Resolution *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

"Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

"The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this Joint Resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States; but the liability of the United States in this regard shall

in no case exceed four million dollars. So long, however, as the existing Government and the present commercial relations of the Hawaiian Islands are continued as hereinbefore provided, said Government shall continue to pay the interest on said debt.

"There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

"The president shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as soon as reasonably practicable, *recommend to Congress* such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.

"§ 2. That the commissioners hereinbefore provided for shall be appointed by the President, by and with the advice and consent of the Senate.

"§ 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this Joint Resolution into effect."

Under date of July 8, 1898, the Secretary of State transmitted a copy of this Joint Resolution to the United State Envoy Extraordinary and Minister Plenipotentiary accredited to Hawaii, with instructions as to his duty in the premises.

Referring to the Preamble of that Resolution, the Secretary, in his letter of instructions, said: "These recitals, it will be observed, are made in the language of the treaty of annexation concluded at Washington on the 16th day of June, 1897. They, as well as the other terms of that treaty, were advisedly incorporated in the Joint Resolution, because they embody the terms of cession which have not only been agreed upon by the two Governments, but which have also been ratified by the Government of the Republic of Hawaii. The Joint Resolution, therefore, accepts, ratifies, and confirms, on the part of the United States, the cession formally agreed to and approved by the Republic of Hawaii. As, by the adoption of the Joint Resolution, the ces-

sion of the Hawaiian Islands and their dependencies to the United States is thus concluded, it is assumed that no further action will be necessary on the part of the Hawaiian Government beyond the formalities of transfer. Should that Government, however, desire to take any further action, formally confirmatory of what has been done, no objection will be interposed on the part of the United States. When all preliminaries shall have been settled, you are instructed to accept, in the name of the United States, the formal transfer of the sovereignty and property of the Hawaiian Government, and to raise the American flag, with such suitable ceremonies as may be agreed on for the occasion. It may be advisable for the Hawaiian Government to deliver to you an inventory of the public property transferred to the United States. There are several provisions of the Joint Resolution to which it is deemed proper specially to refer. Until Congress shall provide for the government of Hawaii, 'all the civil, judicial, and military powers exercised by the officers of the existing Government' are to be vested in such person or persons, and to be exercised in such manner, as the President of the United States shall direct. In the exercise of the power thus conferred upon him by the Joint Resolution, the President hereby directs that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies. All such officers will be required at once to take an oath of *allegiance to the United States*, and all the military forces will be required to take a similar oath, and all bonded officers will be required to *renew their bonds to the Government of the United States*. The powers of the minister of foreign affairs will, upon the transfer of the sovereignty and property of Hawaii to the United States, necessarily cease, so far as they relate to the conduct of diplomatic intercourse between Hawaii and foreign powers. The municipal legislation of Hawaii, except such as was enacted for the fulfilment of the treaties between that country and foreign nations, and except such as is inconsistent with the Joint Resolution, or *contrary to the Constitution of the United States*, or to any existing treaty of the United States, is to remain in force till the Congress of the United States shall

otherwise determine. The existing customs relations of Hawaii with the United States and with other countries are to remain unchanged till Congress shall have extended the customs laws and regulations of the United States to the Islands. Under these various provisions, the Government of the Islands will proceed without interruption. Upon the completion of the formalities of the transfer, your functions as Envoy Extraordinary and Minister Plenipotentiary to Hawaii will necessarily cease.

. . . These instructions will be borne to you by Rear Admiral Joseph N. Miller, U. S. Navy, who will proceed to Honolulu in the U. S. S. Philadelphia, and who, together with the commander of the United States military forces present, will act with you in the ceremonies attending the formal transfer of the Islands to the United States."

So that the Secretary of State gave the representative of the United States to understand that the Joint Resolution and the Treaty had the same object in view, namely, to incorporate Hawaii into the United States "as an integral part thereof and under its sovereignty."

Proceeding in our examination of the history of annexation, we find that under date of August 15, 1898, the United States Minister made his official report as to what was done in execution of the Joint Resolution, annexing Hawaii to the United States. That report contains the details of the ceremonies attending the formal transfer of the sovereignty and property of the Hawaiian Government to the United States. From it the following extract is made:

"At a quarter before 12 [on August 12, 1898] the ceremonies opened with prayer, at the conclusion of which I [the United States Minister] arose, and, addressing President Dole, said: 'Mr. President, I present you a certified copy of a Joint Resolution of the Congress of the United States, approved by the President on July 7, 1898, entitled "Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States." This Joint Resolution accepts, ratifies, and confirms on the part of the United States the cession formally consented to and approved by the Republic of Hawaii.' . . . President Dole, taking the copy of the Resolution, said: 'A treaty of political union having been made, and the cession formally consented to

by the Republic of Hawaii having been accepted by the United States of America, I now, in the interest of the Hawaiian body, politic, and with full confidence in the honor, justice, and friendship of the American people, yield up to you, as the representative of the Government of the United States, the sovereignty and public property of the Hawaiian Islands; and, waving his hand to his chief of staff, the Hawaiian flag was saluted by the battery of the Hawaiian National Guard, in which salute our ships in the harbor joined. Then the Hawaiian band played Hawaiian Ponoï for the last time, taps were sounded, and the Hawaiian flag came down, and was taken possession of by the Hawaiian corporal of the guard. Then, replying to President Dole, I said: 'Mr. President, in the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian Government. The admiral commanding the United States naval force in these waters will proceed to perform the duty intrusted to him.' Thereupon the American flag was raised as the band played the Star Spangled Banner, and saluted."

The United States Minister then congratulated "his fellow-countrymen," on "the inevitable consummation of the national policies and the natural relations between the two countries *now formally and indissolubly united.*" He urged the Hawaiians not to rest content in the enjoyment of free institutions, but "to help maintain them in the spirit they will be extended to you, in the spirit you have sought them, in the spirit of fraternity and equality, in the spirit of the Constitution itself, *now the supreme law of the land.*" The oath of allegiance was thereupon administered by the Chief Justice of Hawaii to the officers of that country, each one swearing that he would "support and defend the Constitution of the United States of America against all enemies, foreign and domestic."

It is thus preceived that the Republic of Hawaii ceded, absolutely and without reserve, to the United States of America, all rights and sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, as well as the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description be-

longing to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining; that the cession was accepted, ratified, and confirmed by Congress, and that the Hawaiian Islands and their dependencies were "annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof;" and, what is of vital moment in this case, that such municipal legislation of the Islands as was not "*contrary to the Constitution of the United States*"—and therefore *only* such legislation as was consistent with that instrument—was to remain in force until Congress otherwise determined. Necessarily, therefore, if regard be had merely to the action of Congress, all local legislation inconsistent with the Constitution ceased to have any force in Hawaii after that country thus passed under the sovereign dominion of the United States.

After the passage of the Joint Resolution, and after the formal transfer of Hawaii to the United States, namely, in 1899, Osaki Mankichi, a subject of Japan, was tried in one of the courts of Hawaii for the alleged crime of murder. He was convicted of the crime of manslaughter in the first degree, and sentenced to imprisonment for twenty years at hard labor. Although the crime was of an infamous nature, there was no presentment or indictment of a grand jury, and the verdict was rendered by only nine of the twelve persons composing the petit jury.

Having been placed in prison pursuant to the verdict and sentence, the accused, in 1901, sued out a writ of *habeas corpus* from the District Court of the United States for the Territory of Hawaii, and was discharged, upon the ground that his trial, conviction, sentence, and imprisonment were in violation of the Constitution of the United States, in that he was not proceeded against upon the presentment or indictment of a grand jury, nor found guilty by the unanimous verdict of the petit jury, but only by a majority of the jurors. Hence this appeal.

It should be here stated that by the act of Congress of April 30, 1900, chap. 339, a territorial Government was organized over the Islands which had been acquired under the Joint Resolution of 1898, and those Islands were designated as the Territory of Hawaii. In that act provision was made for grand



juries, and also for petit juries in criminal cases, to be composed, as at common law, of twelve persons. It was also declared that "no person should be convicted in any criminal case except by unanimous verdict of the jury." 31 Stat. at L. 141, 157. It is not contended that that act can have any effect upon the decision of the present case, because the trial, conviction, sentence, and imprisonment of the accused all occurred after the formal transfer to the United States pursuant to the Joint Resolution of 1898, and before the passage of the above act of 1900. We must consequently determine the legality of the proceedings against Mankichi by the law as it was between the date of the acquisition of sovereignty over the Islands by the United States, and the date of the passage of the act of 1900. To that question I now address myself.

It must be assumed that the trial of the accused was in accordance with the municipal law of Hawaii as it existed prior to the approval of the Joint Resolution of 1898. The contrary is not asserted by the accused. But it is conceded by the court that if the words "contrary to the Constitution of the United States" in that Resolution are interpreted according to their usual, ordinary meaning, and if the validity of the trial be tested by the provisions of that instrument, then the prisoner is entitled to his discharge. Nevertheless, it is now held that, although the United States acquired, on the passage of that Resolution, "all rights of sovereignty of whatsoever kind" in and over the Hawaiian Island and their dependencies; although Hawaii then became "an integral part" of the United States, and subject to its "sovereign dominion;" although the United States obtained the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipments, and all other public property belonging to Hawaii; although all its officers took an oath of allegiance to the United States; yet, persons there charged with infamous crimes could not, as of right, before the passage of the act of 1900, invoke for their protection, when prosecuted for crime, the guarantees relating to grand and petit juries found in the Constitution of the United States—the supremacy of which instrument was, in effect, declared by the Joint Resolution when



existing municipal legislation contrary to its provisions was superseded.

Practically, under the view taken by the court, and so far as those guarantees were concerned, if Congress had not chosen to provide a system of criminal procedure—as it did by the act of 1900—for the government, tribunals, and people of Hawaii, then, for an indefinite time—it may have been for a century—the courts in Hawaii although acting under and by the authority of the United States, might have tried persons for capital or infamous crimes in a mode confessedly “contrary to the Constitution of the United States.” The Constitution, speaking with commanding authority to all who exercise power under its sanction, declares that “no person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury;” and it as clearly forbids a conviction in any criminal prosecution except upon the unanimous verdict of a petit jury. In other words, neither the life nor the liberty of any person can be taken, under the authority of the United States, except in the mode thus prescribed. Yet the present holding is that these constitutional requirements need not have been regarded in Hawaii at any time prior to the act of 1900, although that country was an integral part of the United States, and with its inhabitants, was subject, in all respects, to our sovereign dominion. It follows, under the view of the court, that Congress, by non-action simply, could have kept in force even such municipal legislation of the Hawaiian Islands relating to criminal trials as was in palpable conflict with the Constitution of the United States.

I dissent altogether from any such view. It assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament. It assumes that Congress, which came into existence, and exists, only by virtue of the Constitution, can withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction; who, to use the words of the United States Minister, have become our fellow-countrymen; and over whose country we have acquired the authority to exercise sovereign dominion. In my judgment, neither the life nor the liberty nor the property of

any person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal acting under its authority, by any form of procedure inconsistent with the Constitution of the United States. If the accused had committed the crime of murder in the Territory of Arizona; if he had been convicted in any court in that Territory, except under a presentment or indictment of a grand jury, and by the unanimous verdict of a petit jury; and if he had been then sentenced to be hanged, and was hanged, the judge of the court pronouncing the sentence would have been guilty of judicial murder. Of that the decisions of this court leave no room to doubt; for it has been adjudged repeatedly that the people of the organized Territories, as well as the people of the District of Columbia, are entitled, by force of the Constitution alone, to the guarantees of life, liberty, and property found in the Constitution. And yet the result of the present judgment is that the hanging of the accused in Hawaii, an integral part of the United States, after a trial for murder committed there, but not upon indictment of a grand jury or on a verdict concurred in by all of the petit jury, could be sustained as legal if the case had risen at any time prior to the act of 1900. This result has been achieved by the easy method of declaring that when Congress provided that only the municipal legislation of Hawaii not contrary to the Constitution should remain in force, it did not mean what its express words implied according to their ordinary signification; that Congress had no reference to the provisions of the Constitution relating to criminal prosecutions, but intended that the modes of criminal procedure in operation in Hawaii should remain in force until Congress otherwise provided, even if they were, as they are admitted to be, contrary to the Constitution—thus conceding to Congress the power of suspending the constitutional guarantees of life and liberty among a people undeniably subject to the authority and jurisdiction of the United States as completely as are the people of our organized Territories.

Three members of the court, constituting the majority, who concurred in the judgment in *Downes v. Bidwell*, 182 U. S. 244, 288, 289, 291, 292, 45 L. Ed. 1088, 1106-1108, 21 Sup.

Ct. Rep. 770, 787-789, distinctly held that "the Government of the United States was born of the Constitution," and that all the powers enjoyed by it, or which it may exercise, must be derived, either expressly or by implication, from that instrument; that that instrument, in respect of every function of the Government, "is everywhere and at all times potential, in so far as its provisions are applicable;" that wherever a power is given by the Constitution, and a limitation imposed upon its exercise, "such restriction operates upon and confines every action on the subject within its constitutional limits;" that, "as Congress, in governing the Territories, is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limits its power on this subject;" that "every provision of the Constitution which is applicable to the Territories is also controlling therein;" and that "in the case of the Territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." In these views the minority in *Downes v. Bidwell*, constituting four other members of this court, substantially concurred.

The petit jury system existed in Hawaii long before the passage of the Joint Resolution. But it was inconsistent with the Constitution of the United States, in that it allowed a verdict of guilty in a criminal case by a majority of the jurors. Where was the difficulty in applying in Hawaii the constitutional provision forbidding such a verdict? To have applied that provision to Hawaii would not in any essential sense, have imposed upon that country a new system for the trial of crimes. It would have only enforced the existing mode of trial so as to conform to the constitutional requirement in respect of petit juries. It would have left untouched the petit jury system in Hawaii, except as it was contrary to the Constitution. Whatever may be said as to the absence of a grand jury system in Hawaii, it cannot, I think, be said, with any show of reason, that the constitutional provision relating to petit juries was inapplicable in Hawaii after its annexation to this country. Nothing stood in

the way of the court instructing the jury in a criminal case, arising after annexation, that unanimity among the jurors as to the verdict was essential under the Constitution.

In my opinion, the Constitution of the United States became the supreme law of Hawaii immediately upon the acquisition by the United States of complete sovereignty over the Hawaiian Islands, and without any act of Congress formally extending the Constitution to those Islands. It then, at least, became controlling, beyond the power of Congress to prevent. From the moment when the Government of Hawaii accepted the Joint Resolution of 1898, by a formal transfer of its sovereignty to the United States—when the flag of Hawaii was taken down, by authority of Hawaii, and in its place was raised that of the United States—every human being in Hawaii charged with the commission of crime there could have rightly insisted that neither his life nor his liberty could be taken, as punishment for crime, by any process, or as the result of any mode of procedure, that was inconsistent with the Constitution of the United States. Can it be that the Constitution is the supreme law in the States of the Union, in the organized Territories of the United States, between the Atlantic and Pacific oceans, and in the District of Columbia, and yet was not, prior to the act of 1900, the supreme law in Territories and among peoples situated as were the Territory and people of Hawaii, and over which the United States had acquired all rights of sovereignty of whatsoever kind? A negative answer to this question, and a recognition of the principle that such an answer involves, would place Congress above the Constitution. It would mean that the benefit of the constitutional provisions designed for the protection of life and liberty may be claimed by some of the people subject to the authority and jurisdiction of the United States, but cannot be claimed by others equally subject to its authority and jurisdiction. It would mean that the will of Congress, not the Constitution, is the supreme law of the land for certain peoples and Territories under our jurisdiction. It would mean that the United States may acquire territory by cession, conquest, or treaty, and that Congress may exercise sovereign dominion over it, outside of and in violation of the Constitution, and under regulations that could not be ap-

plied to the organized Territories of the United States and their inhabitants. It would mean that, under the influence and guidance of commercialism and the supposed necessities of trade, this country had left the old ways of the fathers, as defined by a written Constitution, and entered upon a new way, in following which the American people will lose sight of, or become indifferent to, principles which had been supposed to be essential to real liberty. It would mean that, if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire Territories in every direction, which are inhabited by human beings, over which Territories, to be called "dependencies" or "outlying possessions," we will exercise absolute dominion, and whose inhabitants will be regarded as "subjects" or "dependent peoples," to be controlled as Congress may see fit, not as the Constitution requires nor as the people governed may wish. Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a colonial system entirely foreign to the genius of our Government and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two Governments over the peoples subject to the jurisdiction of the United States—one, existing under a written Constitution, creating a Government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in virtue of an unwritten law, to be declared from time to time by Congress, which is itself only a creature of that instrument.

I stand by the doctrine that the Constitution is the supreme law in every Territory as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction. I could not otherwise hold without conceding the power of Congress, the creature of the Constitution, by mere non-action, to withhold vital constitutional guarantees from the inhabitants of a territory governed by the authority,

and only by the authority, of the United States. Such a doctrine would admit of the exercise of absolute, arbitrary legislative power under a written Constitution full of restrictions upon Congress, and designed to limit the separate departments of Government to the exercise of only expressly enumerated powers and such other powers as may be implied therefrom—each department always acting in subordination to that instrument as the supreme law of the land. Indeed, it has been announced by some statesmen that the Constitution should be interpreted to mean not what its words naturally, or usually, or even plainly, import, but what the apparent necessities of the hour, or the apparent majority of the people, at a particular time, demand at the hands of the judiciary. I cannot assent to any such view of the Constitution. Nor can I approve the suggestion that the status of Hawaii and that the powers of its local Government are to be “measured” by the Resolution of 1898, without reference to the Constitution. It is impossible for me to grasp the thought that that which is admittedly contrary to the supreme law can be sustained as valid.

I have so far considered the case principally in the light of the results that must, as I think, follow from the interpretation placed by the majority on the Joint Resolution of 1898. But, in my judgment, Congress should not be held to have intended to do what is now attributed to it. When it declared that the municipal legislation of Hawaii *not* “contrary to the Constitution of the United States” should remain in force, it meant that legislation contrary to that instrument should not remain in force after annexation. Those words were inserted out of abundant caution, to make it certain that no municipal legislation of Hawaii contrary to the Constitution should thereafter be regarded as in force. If the above words did not have that effect, for what purpose were they inserted? What local legislation was declared to be abrogated, if not that which was “contrary to the Constitution?” Under the view taken by the court, those words in the Joint Resolution are made wholly inoperative.

It is said to be evident from the terms of the Joint Resolution that Congress intended it to be merely temporary and provisional. Of course, some further legislation by Congress was



contemplated in order to provide a complete territorial Government for Hawaii. But in language perfectly direct and explicit Congress said that *in the meantime* no municipal legislation of Hawaii should be enforced that was "contrary to the Constitution of the United States." And yet a trial conducted in a mode forbidden by that instrument is now sustained as legal.

It is also said that "the laws of the United States" were not extended over the Islands until the organic act of April 30, 1900, was passed. But, by the Joint Resolution of 1898, Congress—assuming that action upon its part to that end was necessary—did extend the *Constitution* over the Hawaiian Islands when it declared that the municipal legislation of Hawaii "not contrary to the Constitution of the United States" should remain in force. And yet the court decides that, although the trial of Mankichi, if tested by the Constitution, was illegal, it must be sustained from the necessities of the case.

Again, it is said that the words "contrary to the Constitution" in the Joint Resolution referred only to such provisions of that instrument as were *applicable* to Hawaii; and in support of that view, reference is made to that part of the Resolution which keeps alive existing customs regulations between Hawaii and the United States and other countries. It seems to me that the argument based on that clause of the Resolution is misleading and fallacious. Customs regulations are not determined by the Constitution. The authority to make them is given by that instrument to Congress; and it was for Congress to say what should be the nature of the customs regulations to be observed in Hawaii. Its direction that existing Hawaiian regulations of customs duties should remain in force until otherwise ordered was, in legal effect, an adoption of them by Congress for the time being. Now, the provisions as to grand and petit juries are in the Constitution, and could not be altered by Congress under any power it possessed. Their applicability, before civil tribunals, in a Territory of the United States, was determinable by the Constitution itself. In other words, if the Constitution was in force at all in Hawaii, prior to the act of 1900, it was in force there for all it ordained, in respect, at least, of the guarantees of life and liberty. To sustain the prosecution of



Mankichi upon the ground that Congress did not intend to supersede the local law permitting a verdict in criminal cases by a majority of the petit jury, but did intend to keep such law in force until altered or abrogated by Congress, is, in effect, to say that, if Congress so ordered, persons charged with crime in Hawaii could, consistently with the Constitution, be tried before a single judge. It is not perceived why the argument based upon the provision as to customs regulations does not lead, logically, to such a result, nor how that provision can have any bearing upon the present case, unless it be that the power of Congress over criminal proceedings in Hawaii, involving the life and liberty of a freeman, is as full, comprehensive, and complete as it is over mere customs regulations. I cannot go that far in upholding the power of Congress over what some are pleased to call our "dependencies" or "outlying possessions," and the "subjects" therein residing.

It is again said that the annexation of Hawaii, and the transfer of its sovereignty, of whatsoever kind, to the United States, did not so *incorporate* it into the United States as to make the Constitution supreme, in *all* respects, in that newly acquired Territory. As the two countries desired that Hawaii, upon annexation, should become "an integral part" of the United States; as all the civil, military, and judicial officers of Hawaii were required to take, and did take, an oath of allegiance to the United States; as Hawaii passed under the "sovereign dominion" of the United States and became subject to all valid laws, civil and criminal, that Congress might enact; as its people may be subjected to punishment for any crime or offense committed against the United States; as by the authority of Hawaii the Hawaiian flag has come down, and in its place that of the United States substituted; and as Hawaiians cannot rightfully invoke for their protection the authority of any Government except that of the United States—in view of these relations between the two countries, it is, to my mind, inconceivable that Hawaii was not so far incorporated into the United States that the Constitution was in force there, after the passage of the Joint Resolution of 1898, in respect, at least, of those personal rights which that instrument expressly guarded against in-

fringement by any tribunal deriving authority from its provisions.

It is further said that under the Joint Resolution of 1898 any new legislation must conform to the Constitution of the United States. This must mean that after the passage of that Resolution the Constitution was operative in Hawaii to prevent new legislation inconsistent with its provisions, but was not operative there so as to prevent the enforcement of local enactments or regulations that were confessedly in violation of that instrument. I cannot forbear saying that this view of the Constitution is most extraordinary. It does not commend itself to my judgment. I had supposed that when the Constitution came into operation in any country or over any people, all local laws, customs, or usages, within the same jurisdiction, that were inconsistent with its provisions, necessarily ceased to have any legal force whatever; otherwise, the declaration of the Constitution, that it was the supreme law of the land, would be meaningless.

But it is said that while *most, if not all*, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply "*from the moment of annexation*," yet the two rights created by the constitutional provisions as to grand and petit jurors "are not fundamental in their nature, but concern merely a method of procedure."

It is a new doctrine, I take leave to say, in our constitutional jurisprudence, that the framers of the Constitution of the United States did not regard those provisions, and the rights secured by them, as fundamental in their nature. It is an indisputable fact in the history of the Constitution that that instrument would not have been accepted by the required number of States, but for the promise of the friends of that instrument, at the time, that immediately upon the adoption of the Constitution, amendments would be proposed and made that should prevent the infringement of any *Federal* tribunal or agency, of the rights then commonly regarded as embraced in Anglo-Saxon liberty; among which rights, according to the universal belief at that time, were those secured by the provisions relating to grand and petit juries. Whatever may be the power

of the States in respects of grand and petit juries, it is firmly settled that the Constitution absolutely forbids the trial and conviction, in a *Federal* civil tribunal, of any one charged with crime, otherwise than upon the presentment or indictment of a grand jury, and the unanimous verdict of a petit jury, composed, as at common law, of twelve jurors.

In *Ex parte Milligan*, 4 Wall. 120, 121, 18 L. Ed. 295, 296, the accused, not in the army of the United States, was tried by a Federal military court-marshal for a crime against the United States, alleged to have been committed in a State that adhered to the Union, and he was denied the right to a trial by jury. This court, referring to the provisions of the Federal Constitution relating to criminal offenses and proceedings, said: "These securities for personal liberty, thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. . . . Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril unless established by a repealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

In *Ex parte Bain*, 121 U. S. 1, 12, 13, 30 L. Ed. 849, 853, 7 Sup Ct. Rep. 781, 787, the court, referring to the constitutional provision relating to grand juries, said: "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as, indeed, in all other instances where construction becomes necessary, we are to place ourselves as

nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had, for a long time, been absorbed in considering the arbitrary encroachments of the Crown on the liberty of the subject, and were imbued with the common law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did . . . in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was *indispensable to the power of the court to try the petitioner for the crime with which he was charged.*"

In *Thompson v. Utah*, 170 U. S. 343, 340-351, 42 L. Ed. 1061, 1066, 1067, 18 Sup. Ct. Rep. 620, 622, 623, which was a case arising in an organized Territory, the question was whether the jury referred to in the original Constitution of the United States, and in the 6th Amendment, was a jury constituted as is was at common law of twelve persons, neither more nor less. This court said: "When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors. . . . When Thompson committed the offense of grand larceny in the Territory of Utah—which was *under the complete jurisdiction of the United States for all purposes of government and legislation*—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. . . . When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons."

Nevertheless, it is contended that the constitutional provisions in question are not fundamental in their nature; that whether a person charged, for instance, with murder, shall be convicted and hung pursuant to a verdict rendered by a majority of the petit jury, rather than by all the jurors, is only "a method of procedure." My judgment refuses assent to this doctrine. I believe it to be most mischievous in every aspect. The provisions as to grand and petit juries are in the Constitution, and the mandatory character of that instrument ought not to

be disregarded. What tribunal, deriving its authority from the United States, can rightfully hold them to be immaterial? Whether those provisions are fundamental in their nature or not, no Federal civil tribunal, existing under the Constitution, and under a solemn obligation to maintain and defend it, can properly or safely ignore them. If the local law under which Mankichi was tried and convicted was contrary to any provision of the Constitution, that instrument should have been respected, whatever the nature of such provision.

The opinion of the court contains observations to the effect that some persons, heretofore convicted of crime in the Hawaiian courts, will escape punishment if the Joint Resolution of 1898 is so interpreted as to make Congress mean what, it is conceded, the words "contrary to the Constitution of the United States" naturally import. In the eye of the law, that is of no consequence. The cases cited by the court fall far short of sustaining the proposition that the court may reject the plain, obvious meaning of the words of a statute in order to remedy what is deemed an omission by Congress. The consequences of a particular construction may be taken into account only when the words to be construed are ambiguous. If, after the passage of the Joint Resolution, the local authorities proceeded in the prosecution of crimes under municipal laws palpably contrary to the Constitution, the fault was theirs. They were informed by the Joint Resolution of 1898, by the Secretary of State, as well as by the Proclamation of President McKinley, announcing the annexation of Hawaii to the United States, that only local legislation not contrary to the Constitution should remain in force. Their fault cannot justify the court in disregarding the express command of Congress that only municipal legislation that was consistent with the Constitution should remain in force in Hawaii. If the accused is held in palpable violation of that instrument, we cannot shrink from discharging him because of its effect upon convictions in other cases. We must interpret the law as it is written. As just stated, the doctrine is well settled that, when the meaning of a statute is plain, there is no room for interpretation. The consequences are for the lawmaking power. If the intention of the Legislature "is expressed in a manner devoid of contradiction and ambiguity,

there is no room for interpretation or construction, and the judiciary are not at liberty, on considerations of policy or hardship, to depart from the words of the statute; that they have no right to make exceptions, or insert qualifications, however abstract justice or the justice of the particular case may seem to require it." Sedwg. Stat. & Const. Law, 253, 328. "We are bound to take the act of Parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws." *Jones v. Smart*, 1 T. R. 44, 52. "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare *ita lex scripta est*, to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice than mere policy and convenience." Story, Const., § 426. "I shall always deem it a duty to conform to the expressions of the Legislature, to the letter of the statute, when free from ambiguity and doubt; without indulging a speculation either upon the impolicy or the hardship of the law." Mr. Justice Chase, in *Priestman v. United States*, 4 Dall. 30, note, 1 L. Ed. 728, note. When, therefore, Congress, in words perfectly clear and free from doubt, declared that the municipal legislation of Hawaii not contrary to the Constitution should remain in force, does not the court usurp the function of making laws, when it rules that certain municipal legislation of Hawaii was in force, although it was manifestly contrary to the Constitution? Can it depart from the plain, distinct words of the statute, upon any ground of policy or to remedy an omission by Congress?

I am of opinion: 1. That when the annexation of Hawaii was completed, the Constitution—without any declaration to that effect by Congress, and without any power of Congress to prevent it—became the supreme law for that country, and, therefore, it forbade the trial and conviction of the accused for murder otherwise than upon a presentment or an indictment of a grand jury, and by the unanimous verdict of a petit jury. 2. That if the legality of such trial and conviction is to be tested alone by the Joint Resolution of 1898, then the law is for the accused, because Congress, by that Resolution, abrogated, or forbade the enforcement of, any municipal law of Hawaii so



far as it authorized a trial for an infamous crime otherwise than in the mode prescribed by the Constitution of the United States; and that any other construction of the Resolution is forbidden by its clear, unambiguous words, and is to make, not to interpret the law.

The judgment of the District Court of the United States for Hawaii, discharging the accused, should be affirmed.

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REID V. COLORADO.

187 U. S. 137—23 Sup. Ct. Rep. 92—47 Law. Ed. 108.

Decided December 1, 1902.

**LIVE STOCK ACT:** *The Colorado statute prohibiting the importation of diseased live stock is not an interference with interstate commerce; nor with the operation of the Animal Industry Act of Congress.*

1. Congress has power to regulate and control the interstate transportation of live stock; and when it acts, its power is paramount throughout the Union; and, to the extent of its legislation, it supercedes the legislative transportation of each State; but when Congress by legislation covers only part of the subject within its scope, the respective States retain the power to legislate as to the rest.
2. By the Animal Industry Act of May 29, 1884, the condition of domestic animals, the causes of contagious and infectious diseases among them, the means to be used to cure or extirpate such diseases, are to be ascertained as well as the methods of transporting and caring for such animals; but the act did not declare rules for the speedy and effectual suppression or extirpation of such diseases; nor did Congress intend by the act to override the power of the respective States to guard the safety of the property of their people, by appropriate legislation.
3. The right that a citizen has under the United States Constitution, to engage in interstate commerce, does not authorize the transporting of diseased live stock into a State against its will.
4. Congress having failed to legislate against the shipping of diseased live stock from one State to another, the State of Colorado had power to enact a statute regulating the shipping of live stock within that State; provided it did not go beyond the necessities of the case, and did not place an unreasonable burden on interstate commerce.
5. The Colorado Act of March 21, 1885, prohibiting the carrying of diseased live stock into the State is valid.
6. To declare an act, either of Congress or of a State legislature, unconstitutional, the reasons for invalidity must be clear.



Supreme Court of the United States. Error to the Supreme Court of the State of Colorado.

Plaintiff in error was convicted under a statute of Colorado. The conviction was affirmed by the Supreme Court of that State (29 Colo. 333, 68 Pac. Rep. 228), and he appeals. Argued October 24, 1902. Affirmed.

Messrs. *John H. Dennison* and *William M. Springer*, for the plaintiff in error.

Messrs. *Charles C. Post* (Attorney General of the State of Colorado) and *Frederic D. McKenney*, for the defendant in error.

Mr. Justice Harlan delivered the opinion of the court:

The plaintiff in error was convicted in the District Court of Arapahoe County, Colorado, and sentenced to confinement for six months in the county jail for a violation of the 2d section of a statute enacted March 21, 1885, to prevent the introduction of infectious or contagious diseases among the cattle and horses of that State. Colo. Session Laws 1885, p. 335.

The judgment was affirmed by the Supreme Court of the State, and, the case having been brought here, it is insisted that by the final judgment the accused has been denied a right specially claimed by him under the Constitution of the United States.

This position depends upon the inquiry whether a certain act of Congress, to be presently referred to, has the scope and effect attributed to it by the accused, and, that contention failing, whether the statute under which he was convicted is repugnant to that instrument.

After reciting that certain infectious and contagious diseases, known as the Texas or splenic fever, Spanish itch, and other diseases of a dangerous and contagious nature, were prevalent among cattle and horse stock in the States and Territories south of the 36th parallel of north latitude, and that it was essential for the protection of the cattle and horses of Colorado to prevent the introduction and spread of all such diseases within that State, the above statute provided:

"§ 1. It shall be unlawful for any person, association, or cor-

poration to bring or drive, or cause to be brought or driven, into this State any cattle or horses having an infectious or contagious disease, or which have been herded, or brought into contact, with any other cattle or horses laboring under such disease, at any time within ninety days prior to their importation into this State.

"§ 2. It shall be unlawful for any person, association, or corporation to bring or drive, or cause to be brought or driven, into this State, between the first day of April and the first day of November, any cattle or horses from a State, Territory, or county, south of the 36th parallel of north latitude, unless said cattle or horses have been held at some place north of the said parallel of latitude for a period of at least ninety days prior to their importation into this State, or unless the person, association, or corporation owning or having charge of such cattle or horses shall first procure from the State Veterinary Sanitary Board a certificate, or bill of health, to the effect that said cattle or horses are free from all infectious or contagious diseases, and have not been exposed, at any time within ninety days prior thereto, to any of said diseases. The expense of any inspection connected herewith to be paid by the owner or owners of such cattle or horses.

"§ 3. Any person violating the provision of this act shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than five hundred (\$500) dollars, nor more than five thousand (\$5,000) dollars, or by imprisonment in the county jail for a term of not less than six months, and not exceeding three years, or by both such fine and imprisonment.

"§ 4. If any person, association, or corporation shall bring, or cause to be brought, into this State, any cattle or horses, in violation of the provisions of sections 1 or 2 of this act, or shall, by false representations, procure a certificate of health, as provided for in section 2 of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by or from said cattle or horses; judgment for damages in any such case, together with the costs of action, shall be a lien upon all such cattle and horses, and a writ of attachment may issue in the first instance without the giving of a bond, and

the court rendering such judgment may order the sale of said cattle or horses, or so many thereof as may be necessary to satisfy said judgments and costs. Such sale shall be conducted as other sales under execution." Colo. Session Laws 1885, p. 335.

There was no proof in the case that the particular cattle in question had any dangerous, infectious, or contagious disease. But it did appear that after being kept a long while in Lubbock and Cochran Counties, Texas, south of the 36th parallel of north latitude, these cattle were shipped on the 20th day of June, 1901, to Denver, Colorado, on their way to their ultimate destination in Wyoming, without being first inspected as required by the statute of the former State. The provisions of the Colorado statute were ignored altogether as invalid legislation. Being asked by one of the witnesses whether he had or not allowed the State Board of Sanitary Inspection to inspect the cattle or whether or not he had procured from the State Veterinary Sanitary Board a certificate or bill of health to the effect that the cattle were free from all infectious or contagious diseases, the defendant said "that the State Board of Sanitary Inspection, through one of their inspectors, had inspected the cattle against his will and desire, but that he had not obtained from the board any certificate or bill of health whatsoever. But he said that he immediately theretofore had had the cattle inspected by a duly authorized inspector of the Bureau of Animal Industry of the United States, at Hereford, in the State of Texas, and had obtained a certificate from him to the effect that the same were free from any infectious or contagious disease; that the reason that he could not get a certificate or bill of health from the State Board of Colorado was because he would not pay the expense of such inspection, and because he had opposed such inspection as unnecessary and without any warrant in law."

When refusing his assent to the State inspection, Reid showed to the State authorities what he called a "United States Certificate."

The certificate was signed by "Arthur C. Hart, Ass't Inspector, Bureau of Animal Industry." That officer certified that he had carefully inspected the cattle in question at Hereford, Texas, and found them "free from Texas or splenic fever infection (*boophilus bovis*), or any other infectious or contagi-

ous disease," and that "no Texas fever infection is known to exist where they have been kept or on the trail over which they have passed." Below the signature of the Assistant Inspector was the following unsigned printed memorandum: "Animals which have been inspected and certified by an inspector of the U. S. Bureau of Animal Industry, and are free from disease, have the right to go into any State and be sold for any purpose, without further inspection or the exaction of fees."

The above, together with certain published regulations prepared and issued by the Bureau of Animal Industry, was all the evidence in the case.

The defendant asked the court to instruct the jury:

That it was unnecessary for the defendant to procure from the Colorado Veterinary Sanitary Board a certificate or bill of health to the effect that his cattle were free from infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto, to any of said diseases, for the reason that the cattle had previously been inspected, "according to the statute of the United States in such case made and provided, and according to the rules and regulations pursuant to said statute, promulgated by the Department of Agriculture, by a duly authorized inspector of the Bureau of Animal Industry of the United States, stationed at Hereford, in the State of Texas, and had been duly certified by such United States inspector to be free from any infectious or contagious disease; and for the further reason that he, the said defendant, then and there exhibited and showed to the said State Inspector of Colorado the said inspection certificate of the United States to said cattle;" and,

That the Colorado statute, approved March 21, 1885, and under which defendant was prosecuted, was repugnant to the provision of the Constitution of the United States giving Congress power to regulate commerce among the States, as well as to the provision declaring that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and was null and void, as imposing unnecessary and unlawful burdens and restrictions upon interstate commerce.

The court refused to so instruct the jury, but instructed them

that if they believed from the evidence, beyond a reasonable doubt, that the defendant did, on or about the 20th day of June, 1901, that is, between the first day of April and the 1st day of November of that year, "unlawfully bring or drive, or cause to be brought or driven, into the State of Colorado, and into the county of Arapahoe, the cattle as mentioned in the information or any part thereof, from certain counties south of the 36th parallel, north latitude; and that said cattle had not been held theretofore at some place north of said parallel of latitude for a period of at least ninety days prior to the importation of said cattle into said State of Colorado; and that the said defendant had not procured from the State Veterinary Sanitary Board of Colorado a certificate or bill of health, to the effect that said cattle were free from infectious or contagious diseases, and to the effect that the same had not been exposed at any time within ninety days prior thereto to any of said diseases; and that then and there the said defendant did refuse and decline to procure, or permit anyone for him to procure, such certificate or bill of health, and did refuse and decline to pay or allow, or suffer or permit anyone for him to pay, the expense of any inspection so as by the act prescribed—then and in that event it is your duty to find the defendant guilty as charged in this information."

The contention here of the defendant is substantially that the subject of the transportation of cattle from one State to another has been so far covered by the act of Congress known as the Animal Industry act of May 29, 1884 (23 Stat. at L. 31, chap. 60, U. S. Comp. Stat. 1901, p. 299), that, after its passage, no enactment by the State upon the same subject was permissible; and that, even in the absence of legislation by Congress, the Colorado statute is invalid, in that, by its natural or necessary operation, it unreasonably obstructs that freedom of commerce among the States which the Constitution established. These questions are recognized by the court as of great importance, and have received its most careful consideration.

Taking up the first branch of the defendant's contention, let us look at the controlling provisions of the above act of Congress, and ascertain whether that statute has the scope and effect claimed for it.

The statute is entitled "An Act for the Establishment of a

Bureau of Animal Industry, to Prevent the Exportation of Diseased Cattle, and to Provide Means for the Suppression and Extirpation of Pleuro-pneumonia and Other Contagious Diseases Among Domestic Animals."

By the first section the Commissioner of Agriculture is directed to organize in his department a Bureau of Animal Industry, to appoint a chief thereof, who shall be a competent veterinary surgeon, and whose duty it shall be "to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the cause of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country." § 1.

By the second section the Commissioner is authorized to appoint two competent agents, practical stock raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be, under the instructions of the Commissioner, "to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous contagious, infectious, and communicable diseases." § 2.

The third section makes it "the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to co-operate in the execution and enforcement of this act." And "whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the Governor of a State or other



properly constituted authorities signify their readiness to cooperate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another." § 3.

In order "to promote the exportation of live stock from the United States," the Commissioner was directed to "make special investigations as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require" (§4); and that "to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia," the Secretary of the Treasury was authorized to take such steps and adopt such measures, not inconsistent with the provisions of the act, as he might deem necessary. § 5.

By another section of the act all railroad companies within the United States, or the owners or masters of any steam or sailing vessel or other vessel or boat, were forbidden to receive for transportation or transport from one State or Territory to another, or from any State into the District of Columbia, or from the District into any State, 'any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia; nor shall any person, company, or corporation deliver for such transportation to any railroad company; or master or owner of any boat or vessel, any live stock, *knowing* them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance



from one State or Territory to another, or from one State into the District of Columbia, or from the District into any State, any live stock, *knowing* them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*, that the so-called splenic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections 4, 5, 6, and 7 of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto." § 6.

Other provisions of the act are as follows:

"§ 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section 6 of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"§ 8. That whenever any contagious, infectious, or communicable disease affecting domestic animals, and especially the disease known as pleuro-pneumonia, shall be brought into or shall break out in the District of Columbia, it shall be the duty of the Commissioners of said District to take measures to suppress the same promptly and to prevent the same from spreading; and for this purpose the said Commissioners are hereby empowered to order and require that any premises, farm, or farms where such disease exists or has existed, be put in quarantine; to order all or any animals coming into the District to be detained at any place or places for the purpose of inspection and examination; to prescribe regulations for and to require the destruction of animals affected with contagious, infectious, or communicable disease, and for the proper disposition of their hides and car-

cases; to prescribe regulations for disinfection, and such other regulations as they may deem necessary to prevent infection or contagion being communicated, and shall report to the Commissioner of Agriculture whatever they may do in pursuance of the provisions of this section.

"§ 9. That it shall be the duty of the several United States district attorneys to prosecute all violations of this act which shall be brought to their notice or knowledge by any person making the complaint under oath; and the same shall be heard before any District or Circuit Court of the United States or Territorial Court holden within the district in which the violation of this act has been committed." [U. S. Comp. Stat. 1901, p. 3185.] 23 Stat. at L. 31, chap. 60 (U. S. Comp. Stat. 1901, p. 299).

It may be here stated that by the act of February 9, 1889, the Department of Agriculture was made one of the Executive Departments of the Government, and placed under the supervision and control of a Secretary of Agriculture (25 Stat. at L. 659, chap. 122, U. S. Comp. Stat. 1901, p. 285), and that by the act of July 14, 1890, the Secretary was vested with all the authority which by the above act of May 29, 1884, was conferred upon the Commissioner of Agriculture. 26 Stat. at L. 282, chap. 707.

It is quite true, as urged on behalf of the defendant, that the transportation of live stock from State to State is a branch of interstate commerce, and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize, and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one State to another is taken under direct national supervision, and a system devised by which diseased stock may be excluded from interstate commerce, all local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. Ed. 23, 73; *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 464,

30 L. Ed. 237, 241, 6 Sup. Ct. Rep. 1114; *Hennington v. Georgia*, 163 U. S. 299, 317, 41 L. Ed. 166, 173, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. R. Co. v. New York*, 165 U. S. 628, 631, 41 L. Ed. 853, 854, 17 Sup. Ct. Rep. 418; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 626, 42 L. Ed. 878, 882, 18 Sup. Ct. Rep. 488; *Rasmussen v. Idaho*, 181 U. S. 198, 200, 45 L. Ed. 820, 821, 21 Sup. Ct. Rep. 594. The power which the States might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the States.

But the difficulty of the defendant's case is that Congress has not by any statute covered the whole subject of the transportation of live stock among the several States, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the States of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious, and communicable disease.

An examination of the animal industry act will made this entirely clear. Three distinct subjects are embraced by that act. One is the ascertainment through the Agricultural Department of the condition of the domestic animals of the United States, the causes of contagious, infectious, or communicable diseases affecting them, the best methods for treating, transporting, and caring for animals, the means to be adopted for the suppression and extirpation of such diseases, particularly that of contagious pleuro-pneumonia, and to collect such information on those subjects as will be valuable to the agricultural and commercial interests of the country. Congress did not assume to declare that "the rules and regulations" which that Department might adopt as necessary "for the speedy and effectual suppression and extirpation of said diseases" should have in themselves, or apart from the action of a State, any binding force upon the State. They were to be certified to the executive authority of each State, and the co-operation of such authorities in executing the act of Congress invited. If the authorities of any State adopted the plans and methods devised by the department, or if the State authorities adopted measures of their own which the Department approved, then the money appropriated by Congress could be used in conducting the required investigations, and in such

*Hennington v.*  
3, 16 Sup. Ct.  
*New York*, 103  
Rep. 418; *Mis-*  
626, 42 L. Ed.  
*Idaho*, 181 U. S.  
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disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one State or Territory into another. Congress did not intend to override the power of the States to care for the safety of the property of their peoples by such legislation as they deemed appropriate. It did not undertake to invest any officer or agent of the Department with authority to go into a State and without its assent take charge of the work of suppressing or extirpating contagious, infectious, or communicable diseases there prevailing, and which endangered the health of domestic animals. Nor did Congress give the Department authority by its officers or agents to inspect cattle within the limits of a State, and give a certificate that should be of superior authority in that or other States, or which should entitle the owner to carry his cattle into or through another State without reference to the reasonable and valid reputations which the latter State may have adopted for the protection of its own domestic animals. It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that “in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.” *Sinnott v. Davenport*, 22 How. 227, 243, 16 L. Ed. 243, 247. The certificate given to the defendant by Assistant Inspector Hart of the Bureau of Animal Industry was in itself without legal weight in Colorado. As said in *Missouri, K. & T. R. Co. v. Haber*, above cited: “While the States were invited to co-operate with the General Government in the execution and enforcement of the act, whatever power they had to protect their domestic cattle against such diseases was left untouched and unimpaired by the act of Congress.” Hence, it was decided in that case that the animal industry act did not stand in the way of the State of Kansas enacting a statute declaring that any person driving, shipping, or transporting, or causing to be shipped, driven, or transported into or through that State, any cattle liable or capable of com-

municating Texas or splenetic fever to domestic cattle should be liable to the person injured thereby for all damages sustained by reason of the communication of said disease or fever, to be recovered in a civil action. We there held that the Kansas statute did nothing more than establish a rule of civil liability, in that State, affected no regulation of interstate commerce that Congress had prescribed or authorized, and impaired no right secured by the National Constitution.

Another subject embraced by the act of Congress related to the exportation from ports of the United States to ports in foreign countries of live stock affected with contagious, infectious, or communicable diseases, especially pleuro-pneumonia; and in relation to that matter the Secretary of the Treasury was authorized to take such steps and adopt such measures, not inconsistent with the act of Congress, as he deemed necessary. As the present case is not one of the exportation of live stock to a foreign country, it is unnecessary to consider what power, if any, remained with the States, after the passage of the Animal Industry Act, to suppress or extirpate diseases that in fact affected live stock, which it was the purpose of the owners to export.

Still another subject covered by the act is the driving on foot or transporting from one State or Territory into another State or Territory, or from any State into the District of Columbia, or from the District into any State, of any live stock *known* to be affected with any contagious, infectious, or communicable disease. But this provision does not cover the entire subject of the transporting or shipping of diseased live stock from one State to another. The owner of such stock, when bringing them into another State, may not know them to be diseased; but they may, in fact, be diseased, or the circumstances may be such as fairly to authorize the State into which they are about to be brought to take such precautionary measures as will reasonably guard its own domestic animals against danger from contagious, infectious, or communicable diseases. The act of Congress left the State free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate commerce. Congress went no further than to make it an offense against the United States for any one *knowingly*

to take or send from one State or Territory to another State or Territory, or into the District of Columbia, or from the District to any State, live stock affected with infectious or communicable disease. The Animal Industry Act did not make it an offense against the United States to send from one State into another live stock which the shipper did not know were diseased. The offense charged upon the defendant in the State Court was not the introduction into Colorado of cattle that he knew to be diseased. He was charged with having brought his cattle into Colorado from certain counties in Texas, south of the 36th parallel of north latitude, without said cattle having been held at some place north of said parallel of latitude for at least the time required prior to their being brought into Colorado, and without having procured from the State Veterinary Sanitary Board a certificate or bill of health to the effect that his cattle, in fact, were free from all infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto to any such diseases, but had declined to procure such certificate or have the inspection required by the statute. His knowledge as to the actual condition of the cattle was of no consequence under the State enactment, or under the charge made.

Our conclusion is that the statute of Colorado as here involved does not cover the same ground as the act of Congress, and therefore is not inconsistent with that act; and its constitutionality is not to be questioned unless it be in violation of the Constitution of the United States, independently of any legislation by Congress. The latter question we now proceed to examine.

Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect. *Henderson v. New York*, 92 U. S. 259, 268, *sub nom. Henderson v. Wickham*, 23 L. Ed. 543, 548. Another is, that a State may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. *Railroad Company v. Husen*, 95 U. S. 465, 472, 24 L. Ed. 527, 531. Again, the acknowledged police powers of a State cannot legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to



defeat or impair a statute passed by Congress in pursuance of the powers granted to it. *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. Ed. 23, 73; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 625, 626, 42 L. Ed. 878, 882, 18 Sup. Ct. Rep. 488, and authorities cited.

Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one State to another State. This will be conceded on all hands. But the defendant is not given by that instrument the right to introduce into a State, against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the State will or may be injurious to its domestic animals. The State—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States.

Is the statute of Colorado liable to the objection just stated? Can the courts hold that upon its face it unreasonably obstructs the exercise of the general right secured by the Constitution to ship or send recognized articles of commerce from one State to another without interference by local authority? Those questions must be answered in the negative. The Colorado statute, in effect, declares that live stock coming between the dates and from the Territory specified are ordinarily in such condition that their presence in the State may be dangerous to its domestic animals; and hence the requirement that before being brought or sent into the State they shall either be kept at some place north of the 36th parallel of north latitude for at least ninety days prior to their importation into the State, or the owner must procure from the State Veterinary Sanitary Board a certificate or bill of health that the cattle are free from all infectious or contagious diseases, and have not been exposed to any of said diseases at any time within ninety days prior thereto. As there is no evidence in the case as to the practical operation of this regulation upon shippers of cattle, as it does not appear otherwise than that the statute can be obeyed without serious embarrassment or unreasonable cost, the court cannot



assume arbitrarily that the State acted wholly without authority or that it unduly burdened the exercise of the privilege of engaging in interstate commerce. The accused seems to have been content to rest his defense upon such grounds as arose upon the face of the local statute, without reference to any evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the State to protect its domestic animals. He seems to have been willing to risk the case upon the simple proposition—based upon the words of the State enactment and upon the act of Congress, reinforced by certain regulations made by the Agricultural Department—that the local statute was inconsistent with that act, and with the general power of Congress to regulate interstate commerce.

As, therefore, the statute does not forbid the introduction into the State of *all* live stock coming from the defined territory—that diseased as well as that not diseased—but only prescribes certain methods to protect the domestic animals of Colorado from contact with live stock coming from that territory between certain dates, and as those methods have been devised by the State under the power to protect the property of its people from injury, and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the State is entitled to accomplish.

One other objection to the Colorado statute must be noticed, namely, that it is inconsistent with the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. This position is untenable. The statute is equally applicable to citizens of all the States. No discrimination is shown. No privileges are granted to citizens of Colorado that are denied to citizens of other States. *Kimmish v. Ball*, 129 U. S. 217, 222, 32 L. Ed. 695, 697, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277.

The principle is universal that legislation, whether by Congress or by a State, must be taken to be valid, unless the contrary is made clearly to appear; and as the contrary does not so appear, the statute of Colorado is to be taken as a constitutional exercise of the power of the State.

Perceiving no error in the judgment to the prejudice of the plaintiff under the Constitution of the United States, *the judgment is affirmed.*

Mr. Justice Brewer dissented from the opinion and judgment of the court.

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EASTON v. IOWA.

188 U. S. 220—23 Sup. Ct. Rep. 238—47 Law. Ed. 452.

Decided February 2, 1903.

NATIONAL BANKS: *Not subject to State legislation.*

1. National banks being established and controlled by congressional legislation, are exempt from the banking laws of the respective States in which they are located.
2. National banks organized under the laws of Congress "are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are appropriate means to that end," such being the case, "their operations cannot be limited or controlled by State legislation."

Error to the Supreme Court of the State of Iowa to review an affirmance of a conviction in the District Court of Fayette County, Iowa, for the offense of having received, as president of a National Bank, a deposit after having knowledge that the bank was insolvent. Argued January 14 and 15, 1903. Reversed.

(The opinion of the Supreme Court of Iowa in the same case is reported in 113 Iowa, 516, 85 N. W. Rep. 795, 86 Am. St. Rep. 559. In the 113 Iowa, it officially appears that the case went up from Fayette County, and not from Winneshiek County, as stated by Mr. Justice Shiras. The array of counsel appearing in the Iowa Supreme Court would also indicate that the case was tried in Fayette County, which is immediately south of Winneshiek County. The bank was located in Winneshiek County.—J. F. G.)

Statement by Mr. Justice Shiras:

In 1899, in the District Court of Winneshiek County, State of Iowa, James H. Easton, who had been previously indicted,

was tried, and found guilty, and sentenced to imprisonment in the penitentiary of Iowa at hard labor for a term of five years, under the provisions of a statute of that State, for the offense of having received, as president of the First National Bank of Decorah, Iowa, a deposit of \$100 in money in said bank, at a time when the bank was insolvent, and when such insolvency was known to the defendant.

At the trial it was contended, on behalf of the defendant, that the statute of Iowa, upon which the indictment was found, did not, and was not intended to, apply to National Banks, organized and doing business under the National Bank acts of the United States, or to the officers and agents of such banks; and that, if the State Statute should be construed and held to apply to National Banks and their officers, the statute was void in so far as made applicable to National Banks and their officers. Both these contentions were overruled by the trial court, and thereupon an appeal was taken to the Supreme Court of the State of Iowa, and by that court, on April 12, 1901, the judgment of the District Court was affirmed. The cause was then brought to this court by a writ of error allowed by the Chief Justice of the Supreme Court of Iowa.

Messrs. *H. T. Reed, Charles F. Brown, C. W. Reed, and John J. Crawford*, for the plaintiff in error.

Mr. *Charles W. Mullan*, for defendant in error.

Mr. Justice Shiras delivered the opinion of the court:

Those portions of the Iowa statute whose validity is the question in this case consist of sections 1884 and 1885 of the Code of that State, and are in the following terms:

"Sec. 1884. No bank, banking house, exchange broker, deposit office, firm, company, corporation, or person engaged in the banking, brokerage, exchange, or deposit business, shall, when insolvent, accept or receive on deposit, with or without interest, any money, bank bills or notes, United States Treasury notes or currency, or other notes, bills, checks, or drafts, or renew any certificate of deposit.

"Sec. 1885. If any such bank, banking house, exchange broker, deposit office, firm, company, corporation, or person shall

receive or accept on deposit any such deposits, as aforesaid, when insolvent, any owner, officer, director, cashier, manager, member, or person knowing of such insolvency, who shall knowingly receive or accept, be accessory, or permit, or connive at receiving or accepting on deposit therein, or thereby, any such deposits, or renew any certificate of deposit, as aforesaid, shall be guilty of a felony, and, upon conviction, shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment in the penitentiary for a term of not more than ten years, or by imprisonment in the county jail not more than one year, or by both fine and imprisonment."

At the trial evidence was adduced tending to show, and the jury found, that the defendant, being engaged in the banking business, as an officer, to wit, president of the First National Bank of Decorah, on the 21st day of August, A. D. 1896, did, as president of said bank, receive and accept on deposit in said bank the sum of \$100 in lawful paper money and of the value of \$100, from one John French, the bank being then and there insolvent, and the defendant then and there well knowing that the said bank was insolvent.

It will be observed that National Banks or banking associations are not specifically named in the statute; and it was hence argued, on behalf of the defendant, that such institutions are not within the enactment. As, however, the State courts, following a previous decision of the Supreme Court of Iowa, in the case of *State v. Field*, 98 Iowa, 748 (62 N. W. Rep. 653), held that the statute was applicable to all banks, whether organized under the laws of the State or the acts of Congress, we must accept that construction as correct, and confine our consideration to the question whether, as so construed, the act is within the jurisdiction of the State.

It is obvious that the two sections of the statute, above quoted, must be read together as one enactment. If section 1884, regarded as applicable to National Banks, is a valid exercise of power by the State, then the penalties declared in section 1885 can be properly enforced; but if section 1884 must be held invalid as an attempt to control and regulate the business operations of National Banks, then the penal provisions of section 1885 cannot be enforced against their officers. In other words,

the validity of the mandatory and the penal parts of the statute must stand or fall together.

What, then, is the character of a State law which forbids National Banks, when insolvent, from accepting or receiving on deposit, with or without interest, any money, bank bills or notes, United States Treasury notes or currency, or other notes, bills, checks, or drafts, or renewing any certificate of deposit?

The answer given by the Supreme Court of Iowa to this question is as follows:

"The acts of Congress provide no penalty for the fraudulent receiving of deposits, and the statute under consideration operates upon the person who commits the crime. And it is not a material question to determine whether it will be necessary to investigate the financial condition of the bank to prove that the bank was insolvent when the deposit was received. This statute is in the nature of a police regulation, having for its object the protection of the public from the fraudulent acts of bank officers. The mere fact that in violating the law of the State the defendant performed an act pertaining to his duty as an officer of the bank does not in any manner interfere with the proper discharge of any duty he owes to any power, State or Federal. Surely, it was not intended by any act of Congress that officers of a National Bank should be clothed with the power to cheat and defraud its patrons. National Banks are organized and their business prosecuted for private gain, and we can conceive of no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking."

We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating National Banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of State legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States. Having due regard to the National character and purposes of that system, we cannot concur in the suggestion that National Banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain. The principles enunciated in *M'Cullough v. Maryland*, 4 Wheat. 425 (4

L. Ed. 606), and in *Osborn v. Bank of United States*, 9 Wheat. 738 6 L. Ed. 204), though expressed in respect to banks incorporated directly by acts of Congress, are yet applicable to the later and present system of National Banks.

In the latter case it was said by Chief Justice Marshall:

"The bank is not considered as a private corporation whose principal object is individual trade and individual profit, but as a public corporation created for public and National purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the Government, is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court in the case of *McCulloch v. Maryland* is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the Government of the United States.'"

A similar view of the nature of banks organized under the National Bank laws has been frequently expressed by this court. Thus, in *Farmers' Nat. Bank v. Dearing*, 91 U. S. 29 (23 L. Ed. 196), it was said:

"National Banks organized under the act are instruments designed to be used to aid the Government in the administration of an important branch of the public service. They are means appropriate to that end."

Such being the nature of these National institutions, it must be obvious that their operations cannot be limited or controlled by State legislation, and the Supreme Court of Iowa was in error when it held that National Banks are organized and their business prosecuted for private gain, and that there is no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking. Nor is it altogether true, as asserted by that court, that there is no act of Congress prohibiting the receipt of deposits by National Banks or their officers, when a bank is insolvent. It is true that there is no express prohibition contained in the Federal Statutes, but there are apt provisions, sanctioned by severe penalties, which are in-



tended to protect the depositors and other creditors of National Banks from fraudulent banking. It is not necessary to quote at length those provisions, but it will be sufficient to say that banks organized under the National Bank act are authorized to make contracts; to prescribe, by its board of directors, by-laws regulating the manner in which their general business shall be conducted, and the privileges granted by law exercised and enjoyed; to exercise by its board of directors, or duly authorized officers, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes and drafts, bills of exchange; by receiving deposits; by buying and selling exchange; by loaning money on personal security. Such banks are required to deposit with the Treasurer of the United States, as security for their circulating notes, United States bonds in an amount not less than one-fourth of its capital; to report to the Treasurer of the United States twice each year the average amount of its deposits, and to pay to said Treasurer each half year a tax upon such deposits; and to make to the Comptroller of the Currency not less than five reports during each year (and special reports as often as he may require), according to such form as he may require, verified by the oath or affirmation of the president or cashier, which reports shall exhibit in detail the resources and liabilities of the association. The Comptroller is directed to appoint suitable persons to make examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and in doing so to examine any of the officers or agents thereof, and to make a full and detailed report of the condition to the Comptroller. Whenever the Comptroller becomes satisfied of the insolvency of such bank he may, after due examination of its affairs, appoint a receiver, who shall take possession of the assets of the association, wind up its affairs, and make ratable distribution of its assets. And severe penalties are imposed upon any officer or agent of such association who violates any of the provisions of the National Bank Act.

It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute.



It is argued by the learned Attorney General on behalf of the State of Iowa that "the effect of the Statute of Iowa is to require of the officers of all banks within the State a higher degree of diligence in the discharge of their duties. It gives to the general public greater confidence in the stability and solvency of National Banks, and in the honesty and integrity of their managing officers. It enables them better to accomplish the purposes and designs of the general government, and is an aid, rather than impediment, to their utility and efficiency as agents and instrumentalities of the United States."

But we are unable to perceive that Congress intended to leave the field open for the States to attempt to promote the welfare and stability of National Banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

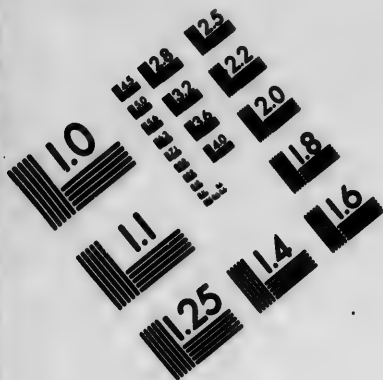
Nor can we concede that by such legislation of a State as was attempted in this instance, the affairs of a National Bank, or the security of its creditors, would be advantageously affected. The provision of the State Statute is express that it is the duty of the officers of the bank, when they know it is insolvent, to at once suspend its active operations; for it is obvious that to refuse to accept deposits would be equivalent to a cessation of business. Whether a bank is or is not actually insolvent may be, often, a question hard to answer. There may be good reason to believe that, though temporarily embarrassed, the bank's affairs may take a fortunate turn. Some of the assets that cannot at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency be avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. *McDonald v. Chemical Nat. Bank*, 174 U. S. 610 (43 L. ed. 1106, 19 Sup. Ct. Rep. 787). But, under the State Statute, no such conservative action can be followed by the officers of the bank except at the risk of the penalties of fine and imprisonment. In such a case the provisions of the Federal Statute would permit the Comptroller to withhold closing the bank, and to give an opportunity to escape final insolvency. It would seem that such an exercise

of discretion on the part of the Comptroller would, in many cases, be better for all concerned than the unyielding course of action prescribed by the State Law. However, it is not our province to vindicate the policy of the Federal Statute, but to declare that it cannot be overridden by the policy of the State.

Similar legislation to that of the State of Iowa has been considered and disapproved by the Supreme Courts of several of the other States.

Thus, in *Commonwealth v. Ketner*, 92 Pa. St. 372 (37 Am. Rep. 692), one Torrey was indicted and found guilty under a charge that, as the cashier of the First National Bank of Ashland, organized under the laws of the United States, he had embezzled the moneys of the said bank contrary to the form of the act of assembly of the State of Pennsylvania, prescribing a penalty of fine and imprisonment. A writ of *habeas corpus* was allowed by the Supreme Court of the State, and the accused was discharged. That court, having quoted the acts of assembly relied on, said:

"We are spared further comment upon these acts, for the reason that they have no application to National Banks. Neither of them refers to National Banks in terms, and we must presume that when the legislature used the words 'any bank' that it referred to banks created under and by virtue of the laws of Pennsylvania. The National Banks are the creatures of another sovereignty. They were created and are now regulated by the acts of Congress. When our acts of 1860 and 1861 were passed there were no National Banks, nor even a law to authorize their creation. When the act of 1878 was passed, Congress had already defined and punished the offense of embezzlement by the officers of such banks. There was therefore no reason why the State, even if it had the power, should legislate upon the subject. Such legislation could only produce uncertainty and confusion, as well as a conflict of jurisdiction. In addition, there would be the possible danger of subjecting an offender to double punishment, an enormity which no court would permit, if it had the power to prevent it. An act of assembly prescribing the manner in which the business of *all* banks shall be conducted, or limiting the number of the directors thereof, could not by implication be extended to National Banks, for the rea-



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son that the affairs of such banks are exclusively under the control of Congress. Much less can we, by mere implication, extend penal statutes . . . to such institutions. The offense for which the relator is held is not indictable, either at common law or under the Statutes of Pennsylvania. We therefore order him to be discharged."

In *Allen's Appeal*, 119 Pa. St. 192 (13 Atl. 70), the question was whether a State Law, which forbade "any cashier of any bank from engaging, directly or indirectly, in the purchase or sale of stock, or in any other profession, occupation, or calling other than his duty as cashier," and which declared the same to be a misdemeanor, was applicable to the cashier of a National Bank, and it was held that it was not so applicable, the court saying, among other things:

"The National Banking Act and its supplements create a complete system for the government of those institutions. Conceding the power of Congress to create this system, we are unable to see how it can be regulated or interfered with by State legislation. The Act of 1860, if applied to National Banks, imposes a disqualification upon cashiers of such institutions where none has been imposed by act of Congress. If the State may impose one qualification upon the cashiers, why not another? If upon the cashier, why not upon the president or other officer? Nay, further, suppose the legislature should declare that no person should be a bank director unless he has arrived at fifty years of age, or should be the owner of one hundred shares of stock, could we apply such an act to National Banks? If so, such institutions would have a precarious existence. They would be liable to be interfered with at every step, and it might not be long before the whole National Banking System would have to be thrown aside as so much worthless lumber."

*People v. Fonda*, 62 Mich. 401 (29 N. W. 26), was a case wherein a clerk of a National Bank was prosecuted in a State court and found guilty of larceny and embezzlement of the funds of the bank under the statute of the State. But it was held by the Supreme Court of the State that the offense was within the laws of the United States, and that, accordingly, the State court was without jurisdiction. It was said by the court

—in view of section 711 of chapter 12 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 577), in the following terms: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several States: First, of all crimes and offenses cognizable under the authority of the United States"—that Congress, by law, created the National Banking System, and provided for its internal workings, and prescribed a punishment for the offense charged against the defendant. It seems, clearly, the case is one falling within section 711, above quoted, and that by the Federal Law itself the jurisdiction of the State is expressly excluded. Chancellor Kent, in his Commentaries (1 Com. 400), says: "In judicial matters the concurrent jurisdiction of the State tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal courts; and that, without an express provision to the contrary, the State courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter;" and accordingly the judgment of the trial court was reversed and the prisoner discharged.

In *Commonwealth v. Felton*, 101 Mass. 204, the defendant was charged with being an accessory to an embezzlement by an officer of a National Bank, and it was said by the court:

"The difficulty in the way of holding the defendant upon the present indictment is that the Act of Congress has taken the crime of the principal out of our jurisdiction. Our courts can not deal with him upon that charge."

A law of the State of Kansas provided that no bank should receive deposits when it was insolvent, and prescribed a punishment for a violation of that provision by any officer or agent of such bank; but it was held by the Supreme Court of that State that the provisions of the State law had no application to National Banks, and that the penalties prescribed were not operative as against officers of National Banks. *State v. Menke*, 56 Kan. 77 (42 Pac. 350).

The same view has prevailed in the lower Federal courts. In

*Sutton Mfg. Co. v. Hutchinson*, 11 C. C. A. 320 (24 U. S. App. 145, 63 Fed. 501), it was said by the Circuit Court of Appeals, through Mr. Justice Harlan:

"A corporation is not required by any duty it owes to creditors to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers and by the use of all legitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created."

In *In re Waite*, 81 Fed. 359, it was held by the Circuit Court of the United States for the District of Iowa that a pension examiner of the United States was not liable to a criminal prosecution in the courts of a State for acts done by him in his official capacity. In the opinion it was said:

"The question which marks the limit of the State jurisdiction is whether the person sought to be called to account was acting under the authority of the United States when the acts complained of were done, in and about a subject-matter within Federal jurisdiction, . . . for the criminal statutes of the State are not applicable to acts done within the plane of Federal jurisdiction and under the authority of the United States. Whenever it is made to appear in a criminal case pending in the State court that the acts charged in the indictment were done by the defendant as an officer or agent of the United States in and about a matter within Federal control, . . . then it is made to appear that the State court is asked to assume a jurisdiction which it cannot rightfully exercise; and if that court entertains the case and proceeds to adjudicate on the question of the extent of the authority possessed by the officers of the United States, . . . testing the same by the provisions of State statutes, . . . it proceeds at the peril of having its jurisdiction questioned and denied."

So, in *In re Thomas*, 82 Fed. 304, it was held by the Circuit Court of the United States for the Southern District of Ohio that the governor of the soldiers' home at Dayton, Ohio, in serving to the inmates, as food, oleomargarine furnished by the government, is not subject to the law of the State prescribing the



manner in which oleomargarine shall be used in eating houses, because his act is that of the Government of the United States within its constitutional powers, and wholly beyond the control or regulation of the legislature of the State.

This judgment was affirmed by this court in *Ohio v. Thomas*, 173 U. S. 276 (43 L. Ed. 699, 19 Sup. Ct. Rep. 453).

A leading case in which this court had occasion to consider the limitation of legislation by a State affecting a subject within the scope of action by Congress is that of *Prigg v. Pennsylvania*, 16 Pet. 539 (10 L. Ed. 1060), from which we quote the following observations:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the State legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it."

On the immediate subject of control over National Banks, it was said, in *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 29 (23 L. Ed. 196):

"The States can exercise no control over National Banks, nor in anywise affect their operation, except in so far as Congress may see proper to permit. Everything beyond this is an 'abuse', because it is the usurpation of power which a single State cannot give. Against the national will the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of constitutional laws enacted by Congress to carry into execution the powers vested in the general Government."

This subject has received recent and careful consideration in the case of *Davis v. Elmira Sav. Bank*, 161 U. S. 275 (40 L. Ed. 700, 16 Sup. Ct. Rep. 502), twice argued in this court. The legislature of the State of New York had provided by law that

savings banks, organized under the laws of that State, should have a preference as depositors in banks in case of the insolvency of such banks, and it was sought to apply this provision to the case of a deposit by a savings bank in a National Bank which had subsequently become insolvent. But this court held that such a provision could not be extended by the State to National Banks, because it was repugnant to that provision of the National Banking Act which requires the assets of an insolvent National Bank to be ratably distributed among its creditors. In the opinion of the court, by Mr. Justice White, it was said:

"National banks are instrumentalities of the Federal Government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the National legislation or impairs the efficiency of these agencies of the Federal Government to discharge the duties for the performance of which they were enacted. These principles are axiomatic, and are sustained by the repeated adjudications of this court."

Our conclusions, upon principle and authority, are that Congress, having power to create a system of National Banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by Federal officers; that it is not competent for State Legislatures to interfere, whether with hostile or friendly intentions, with National Banks or their officers in the exercise of the powers bestowed upon them by the general Government.

*Cross v. North Carolina*, 132 U. S. 131 (33 L. Ed. 287, 10 Sup. Ct. Rep. 47), was a case wherein this court pointed out the distinction between crimes defined and punishable at common law or by the general statutes of a State and crimes and offenses cognizable under the authority of the United States; and accordingly it was held that the crime of forging promissory notes, purporting to be made by individuals, and made payable to or at a National Bank, was a distinct and separate offense, indictable under the laws of the State.

Undoubtedly a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may declare, by special laws, certain acts to be criminal offenses when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.

It was by failing to observe the distinction between the two classes of cases that, we think, the court below fell into error.

*The judgment of the Supreme Court of Iowa is reversed*, and the cause is remanded to that court to take further action not inconsistent with the opinion of this court.

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STATE v. KENILWORTH.

69 N. J. L. 114—54 Atl. Rep. 244.

Decided February 24, 1903.

PALMISTRY: *A crafty science.*

The act concerning disorderly persons (P. L. 1898, p. 942) is valid in so far as it declares that persons who use palmistry shall be adjudged disorderly, and punished.  
(Syllabus by the Court.)

Zoza Kenilworth, being convicted before the Recorder of Atlantic City, brings *certiorari*. Affirmed.

H. Wootton, for the State.

R. H. Ingersoll, for the defendant.

DIXON, J. The prosecutor was convicted before the Recorder of Atlantic City, and fined for "pretending to use and using

palmistry" in violation of section 1 of the act concerning disorderly persons (P. L. 1898, p. 942). The language of the enactment so far as now pertinent is, "all persons who shall use or pretend to use or have skill in physiognomy, palmistry or like crafty science . . . shall be deemed and adjudged to be disorderly persons." This provision has been part of our statutory law since June 10, 1799 (Patterson's Laws, p. 410).

One reason urged by the prosecutor of this *certiorari* for quashing his conviction is that the enactment is unconstitutional, but with this concession, that if palmistry is found to be a crafty science then the objection will not hold. Undoubtedly, within the intent of this statute, palmistry is a crafty science, that is, one by which the simple-minded are apt to be deceived. So much is plainly indicated by the collocation of words "palmistry or like crafty science." It was so used by the prosecutor when, from the lines on the palm of the complaining witness, he foretold the age at which the witness would marry and the duration of his life. If ever there shall be discovered any rational evidence that palmistry is a real science, its use for honest purposes will pass beyond the range of this statute; but in the present case the use of palmistry was plainly within the prohibition. We find no reason for denying the validity of the act.

The only other objection to the conviction is that the act (section 36) authorizes a conviction only on the oath or affirmation of one or more "credible" witnesses, while the record of conviction shows that it was based on the testimony of a "credible" witness. The use of the word "credible" to signify "worthy of belief" is said by lexicographers to be obsolete; and antiquity cannot be invoked to justify its use here in that sense, for it was introduced by our act of 1888 (P. L. 1888, p. 249). Nevertheless, we think such is its significance in this statute, and by a "credible witness" is meant one whose testimony is worthy of credit, credence, belief; that is, in more modern phrase, a credible witness.

The conviction should be affirmed, with costs.

## CONEY v. STATE.

113 Ga. 1060—39 S. E. Rep. 425.

Decided July 23, 1901.

*Riot: \* Elements of the offense—Concert of action.*

To constitute the offense of riot, there must be not only a common intent on the part of two or more persons to do an unlawful act of violence, or some other act in a violent and tumultuous manner, but also concert of action in furtherance of such intent.  
(Syllabus by the Court.)

Error from the City Court of Dublin; Hon. J. S. Adams, Judge.

Green Coney, being convicted of riot, brings error. Reversed.

*Griner & Williams*, for the plaintiff in error.

*F. G. Corker*, for the State.

LUMPKIN, P. J. The plaintiff in error, Green Coney, was jointly indicted with Robert Jordan for the offense of riot. The sole question here presented is whether or not, under the evidence introduced in behalf of the State, the conviction of Coney can lawfully be sustained. There was testimony to the following effect: Coney and Jordan were seen standing about a hundred yards from a house where a frolic was in progress, and were heard to say, "Let's go and break up the God-damned thing. It ain't no count, nohow." They then went to the house and entered it. Jordan joined in a game that was being played, having for his partner a girl named Ella Nobles. Coney walked across the room and kissed this girl. This she did not resent, but Jordan said: "Look out. That is my girl." Thereupon one Baker said to Jordan: "Mind out. That is my kid;" and they began "fussing" with each other, and drew weapons. In this altercation Coney took no part. The girls began to leave the house, and Coney was heard to say: "God damn it. I am in my liquors." A witness went to him and asked him to stop cursing, telling him "this was no negro frolic." He replied "he

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\*See Riot in Table of Topics, and the four succeeding cases.

was sure that it was no white man's frolic." This witness testified that he saw Coney "do nothing, but did hear him curse." After talking with him as above set forth, the witness "got the girls back in the house, and the frolic went on as before."

Section 354 of the Penal Code declares that: "If two or more persons do an unlawful act of violence, or any other act in a violent and tumultuous manner, they shall be guilty of a riot." There must be concert of action on the part of two or more persons in furtherance of a common intent. *Prince v. State*, 30 Ga. 27; *Stafford v. State*, 93 Ga. 207, 19 S. E. Rep. 50; *Dixon v. State*, 105 Ga. 787, 31 S. E. Rep. 750; *Tripp v. State*, 109 Ga. 489, 34 S. E. Rep. 1021 (12 American Criminal Reports, 558). "The mere making a noise or behaving tumultuously will not alone constitute riot, in the absence of any violence." *Baron v. State*, 74 Ga. 833. It does not appear that Coney actually did more than this, notwithstanding he had expressed a willingness to join in a project to "break up" the frolic on the ground that it was "no count nohow." On entering the house, neither he nor Jordan proceeded to carry this project into execution. On the contrary, the latter immediately entered into the merrymaking, while Coney, left to his own resources, embarked upon a wholly independent plan of diversion, which called forth a protest on the part of Jordan. Baker was the aggressor in the quarrel which ensued between him and Jordan, and neither by word nor act did Coney participate therein. Certain it is that he did not join with Jordan in any overt act of violence, nor did the latter take part with him in the disturbance which he created by his drunken misbehavior. This being so, the case falls squarely within the ruling announced in *Tripp v. State*, *supra*, in which it was held that "where, in a given case, it is shown that while two persons were in company one was guilty of an unlawful act of violence, and the evidence fails to disclose any participation by the other in such act, and there were no circumstances from which a common intent to do the act might be inferred, a conviction cannot lawfully stand."

Judgment reversed.

All the justices concurring.

NOTES ON THE LAW REGARDING THE CRIME OF RIOT (by J. F. G.).—Hawkins defines the crime of riot as follows: "A riot seems to be a tumultuous disturbance of the peace, by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another, against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner to the terror of the people, whether the act intended were of itself lawful or unlawful." (1 Hawkins, Pleas of the Crown, 513.)

The above definition is adopted by Roscoe and McClain—Roscoe's Criminal Evidence, 725; McClain on Criminal Law, sec. 992.

Blackstone (Book 4, page 146) says:

"*Riots, routs and unlawful assemblies* must have three persons at least to constitute them. An *unlawful assembly* is when three or more do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it, or making any motion toward it. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way, and make some advances toward it. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel; as if they beat a man, or hunt and kill game in another's park, chase, warren or liberty; or do any other unlawful act with force and violence; or even do a lawful act as removing a nuisance, in a violent and tumultuous manner. The punishment of unlawful assemblies, if to the number of twelve, we have just now seen, may be capital, according to the circumstances that attend it; but, from the number of three to eleven, is by fine and imprisonment only. The same is the case in riots and routs by the common law; to which the pillory, in very enormous cases, has been sometimes superadded. And by the statute 13 Hen. IV., ch. 7, any two justices, together with the sheriff or undersheriff of the county, may come with the *posse comitatus*, if need be, and suppress any such riot, assembly, or rout, arrest the rioters, and record upon the spot the nature and circumstances of the whole transaction; which record alone shall be a sufficient conviction of the offenders. In the interpretation of which statute it hath been holden that all persons, noblemen and others, except women, clergymen, persons decrepit and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding or killing the rioters, that may happen in suppressing the riot, is justifiable. So that our ancient law, previous to the modern Riot Act, seems pretty well to have guarded against any violent breach of the public peace; especially as any riotous assembly on a public or general account, as to redress grievances or pull down inclosures, and also resisting the King's forces if sent to keep the peace, may amount to overt acts of high treason, by levying war against the King."

In those States where the common law of England and the Acts of Parliament in force at the time of the settlement of America are rec-



ognized as binding, the above paragraph, as well as the entire chapter (4 Bl. Com., ch. 11) should be considered in construing statutes upon riot.

Russell says:

"A riot is described to be a tumultuous disturbance of the peace by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." (1 Russell on Crimes, 266.)

Again the same author says:

"It seems to be clearly agreed, that in every riot there must be some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew of armour, threatening speeches, or turbulent gestures; for every such offense must be laid to be done *in terrorem populi*. But it is not necessary, in order to constitute this crime, that personal violence should have been committed." (Page 267.)

Roscoe says:

"Evidence must be given of some circumstances of such actual force or violence, or, at least, of such apparent tendency thereto, as are calculated to strike terror into the public; as a show of arms, threatening speeches, or turbulent gestures. Hawk. P. C., book 1, ch. 65, sec. 5. But it is not necessary that personal violence should be done or offered. Thus, if a number of persons come to a theatre, and make a great noise and disturbance, with the predetermined purpose of preventing the performance, it will be a riot, though no personal violence is done to any individual, and no injury done to the house. *Clifford v. Brandon*, 2 Campb. 358. But the unlawfulness of the object of an assembly, even though they actually carry their unlawful object into execution, does not constitute a riot, unless accompanied by circumstances of force or violence; and in the same manner, three or more persons assembling together, peaceably, to do an unlawful act, is not a riot. Hawk. P. C., book 1, ch. 65, sec. 5." (Ros. Cr. Ev. 725.)

*The Common Law, as it was at the time of the settlement of America.*—Probably the best authority we have on the Common Law, as it existed at the time of the settlement of America, and, therefore was the common law as transmitted to us, are the Institutes of Sir Edward Coke. The biography of Sir Edward Coke may be summarized as follows:

Born February 1, 1552; Recorder of Norwich 1586; Recorder of London 1592; member of Parliament 1593; Attorney General 1594-1606; Chief Justice of the Court of Common Pleas 1606; Chief Justice of the Court of King's Bench 1613; member of Parliament 1620; in prison seven months 1621-1622; returned to Parliament 1628, where he took an active part in drafting the "Petition of Right;" retiring at the close of the session, he devoted his attention to revising and improving his works; died September 3, 1633.

On page 176, of 3 Coke's Institutes, under the heading, Of Riots,

Routs, Unlawful Assemblies, Forces, &c., together with marginal notes are four paragraphs, in form and spelling, as follows:

*RIOTUM* commeth of the French word, *rioter*, i. *risari*: and in the common law signifieth, when three or more doe any unlawful act, as to beat any man, or to hunt in his park, chase, or warren, or to enter or take possession of another mans land, or to cut or destroy his corne, grasse, or other profit, &c.

\**Routa* is derived of the French word *rout*, and properly in law signifieth, when three or more do any unlawful act for their own, or the common quarrel, &c. As when commoners break down hedges or pales, or cast down ditches, or inhabitants for a way claimed by them, or the like.

An unlawful assembly is when three or more assemble themselves together to commit a riot or rout, and doe it not. *Prædomes autem nominamus usq; numerum septem virorum; deinde (quousq; numerus 35 coaluerit) turmam (Saxonice hloth) dicimus; numerus si excreverit, exercitum vocamus, hlothbota*, to be quilt of unlawful assemblies.

One may commit a force. But of this, that I may not unprofitably repeat, you may reade at large Fitzherbert, and those others that have written of this argument.

From the above authorities, we may draw the conclusion, that the law pertaining to riots, applies to offenses of a grave character, executed "*in a violent and turbulent manner to the terror of the people;*" and not to cases where three or more persons jointly commit an ordinary assault or are guilty simply of hilarious or disorderly conduct.

As to the various phases of the law upon this subject see:

McClain on Criminal Law, §§ 991 to 1002, inclusive.

Roscoe's Criminal Evidence, 725 to 731, inclusive.

1 Russell on Crimes, 266 to 291, inclusive.

4 Blackstone's Commentaries, ch. 11.

3 Greenleaf on Evidence, §§ 216 to 222, inclusive.

Hughes' Criminal Law, §§ 1297 to 1308, inclusive.

Clark's Criminal Law, § 152.

*Blackwell v. State*, 30 Tex. Ct. App. 672, 9 Am. Crim. Rep. 582.

*McRae v. State*, 71 Ga. 96, 5 Am. Crim. Rep. 622.

*People v. O'Laughlin*, 3 Utah, 133, 4 Am. Crim. Rep. 542.

As to Illinois statutes and practice, see Cameron's Criminal Law, sections 247 to 256, inclusive; but it must be borne in mind, that the provisions of the Illinois statutes, assuming to give authority to military officers, to arrest disorderly persons without written warrants, and to hold them at the discretion of such officers, are in violation of the organic law of the land, and therefore cannot be enforced.

\**Latine Turba—comes est discordia vulgi; Namq; a turbando nomen sibi turba recepit.* Lamb. int. Leg. Inae ca. 13, 14, 15. Vide Alvered. cap. 26.

†*Turma quasi tordena.*

## GREEN et al. v. STATE.

109 Ga. 536—35 S. E. Rep. 97.

Decided January 26, 1900.

RIOT: \* *Indictment—Evidence—Instructions.*

1. An indictment alleging that certain named persons "did, in a violent and tumultuous manner, prevent the sheriff . . . from removing from the common jail" a prisoner therein confined, sufficiently charges the offense of riot, as against a special demurrer setting up that the indictment did "not allege any act, done in a violent and tumultuous manner, which prevented" the sheriff from removing the prisoner. *Aliter*, if the point had been made that the act charged was not set forth with sufficient particularity.
2. Evidence warranting a finding that a number of persons, some of whom were armed with deadly weapons, plainly exposed to view, suddenly congregated at a given signal for the purpose of preventing the removal of a prisoner from jail by the sheriff and his posse, acted in an excited manner, talked loudly, ran about from place to place, and made use of threatening, profane, and violent language, thereby intimidating the sheriff and his posse, and actually preventing the removal of the prisoner until the arrival of military troops sent to his assistance, authorized the conviction of these persons of the offense of riot. (a) All persons connected with and sharing in the common purpose of the assembly were guilty of riot, whether their conduct was violent and tumultuous or not.
3. The judge committed no error in charging or in refusing to charge as requested. Such of the other grounds of the motion for a new trial as present questions in a manner that can be dealt with disclose no error requiring the granting of a new trial.  
(Syllabus by the Court.)

The special demurrer above referred to was intended to present, and did sufficiently present, the objection to the indictment that it did not set forth what means the accused employed, or what specific act or acts they did, for the purpose of preventing the removal of the prisoner, and therefore did not with the requisite particularity put the accused on notice of the charge they were called upon to meet. Thus interpreted, the demurrer was good, and ought to have been sustained. Per Lumpkin, P. J., and Fish, J., dissenting.

Error to the Superior Court of McIntosh County; Hon. P. E. Seabrook, Judge.

Jonas Green and others, being convicted of riot, bring error. Affirmed.

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\*See Riot in Table of Topics.

*Twiggs & Oliver, A. A. Lawrence, R. L. Colding, and R. L. Travis*, for the plaintiffs in error.

*L. Kenan*, Solicitor General, *W. G. Charlton*, and *W. C. Hartridge*, for the State.

COBB, J. Jonas Green, Moses Miller, Jr., Lawrence Baker, and a number of others were arraigned in the Superior Court of McIntosh County on an indictment containing two counts, each of which charged the commission of the offense of riot. The first count charged that these persons, on a day named, "having a common cause of quarrel, did violently and tumultuously commit an unlawful act of violence, by preventing the sheriff of said county from removing from the common jail of said county one Henry Delegal, a prisoner therein under the laws of Georgia, to the terror of the people, and contrary to the laws of said State," etc. The second count charged that the persons named in the indictment, "with a common cause of quarrel, did, in a violent and tumultuous manner, prevent the sheriff of McIntosh County from removing from the common jail of said county one Henry Delegal, therein confined under the laws of Georgia." The accused filed demurrers, both general and special, to the indictment; the special demurrers being as follows: (1) The indictment does not set forth or describe in the first count thereof any unlawful act of violence which prevented the sheriff from removing Delegal from the common jail of McIntosh County; (2) the indictment does not, in the second count thereof, allege any act done in a violent and tumultuous manner which prevented the sheriff from removing the prisoner. The demurrers were overruled, and exception was duly taken to this ruling. After evidence was introduced, the jury returned a verdict of guilty as to Green, Miller, and Baker, who had elected to sever from the others, and were tried jointly. They made a motion for a new trial, which was overruled, and they excepted.

It appears from the evidence that the sheriff of McIntosh County and his posse attempted to remove Henry Delegal, a prisoner, from jail, and carry him to Savannah. About the time this attempt was being made a church bell was rung, at which signal a crowd of persons, variously estimated at from

75 to 250, among whom were the plaintiffs in error, began suddenly and rapidly to congregate. The members of the crowd ran about from place to place, cursing and talking loudly and in an excited manner. A number of them were armed with deadly weapons, plainly exposed to view. Some members of the crowd were heard to make use of threatening and violent language; one remarking that the sheriff and his assistants were going to remove Delegal to Savannah, and that he was going to "see about it." Another was heard to remark, upon the arrival of troops sent to quell the disturbance, that: "They are working a new trick on us. Get to your arms." Another said "she would be the first to throw a couple of shots among the white sons of bitches." And still another said that "they intended to kill out all the white people in town." The crowd, however, made no hostile demonstration toward the sheriff or his posse; but, as he testifies, he was prevented by their conduct from removing the prisoner until later on, when he was enabled to accomplish this purpose with the aid of troops which were sent to his assistance. It is evident from the testimony that the crowd was in an ugly frame of mind, and that it needed but little to stir them into the commission of open acts of violence, and most probably bloodshed. The evidence shows that the plaintiffs in error were connected with the other members of the crowd, and shared their common purpose, and that all of them were armed.

1. The section of the Code dealing with the subject of riot is in the following language: "If two or more persons do an unlawful act of violence, or any other act in a violent and tumultuous manner, they shall be guilty of a riot, and be punished as for a misdemeanor." Pen. Code, § 354. Riot at common law is defined by Sir William Blackstone as follows: "A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, . . . or do any other unlawful act with force or violence, or even do a lawful act . . . in a violent and tumultuous manner." 4 Bl Comm. 147. The only material difference between the two definitions seems to be that at common law the offense could not be committed by less than three persons, and under our statute it can be committed by two. The words "with or without a common cause or quarrel" were originally in the Code defini-

tion. See Code 1882, § 4514. But these words were omitted from the Code of 1895. Their omission does not materially change the definition of the offense, and therefore, in substance, it remains the same as it was at common law. The section of the Code above quoted embraces two separate and distinct classes of riot; the first being when "an unlawful act of violence" is committed, and the second when two or more persons commit "any other act in a violent and tumultuous manner." Under the view we take of the present case, it is unnecessary to determine whether, as against the demurrer filed in the present case, the first count in the indictment sufficiently charges the commission of an unlawful act of violence. See, in this connection, however, *Reg. v. Gulston*, 2 Ld. Raym. 1210; *Bonneville v. State*, 53 Wis. 680, 11 N. W. Rep. 427; *State v. Brazil*, Rice, 257; *State v. Dillard*, 5 Blackf. 365. An examination of the evidence in this case has satisfied us, as will be shown hereafter, that it was sufficient to authorize the conviction of the persons on trial of that class of riot which is brought about by the commission of some act in a violent and tumultuous manner. It is necessary, therefore, to determine whether the second count in the indictment, which attempts to charge such an offense, was a sufficient indictment, as against the demurrer which was filed to the same. The indictment charges that the persons accused, with others, "did in a violent and tumultuous manner prevent the sheriff" from removing a certain named person from the common jail of the county, who was lawfully confined therein. The special demurrer makes the objection that this count does not "allege any act, done in a violent and tumultuous manner, which prevented" the sheriff from removing the prisoner. The question which the demurrer raises is whether the words in the indictment charge that an act, within the meaning of the Penal Code, was done by the persons named therein. The demurrer does not raise the question as to whether, conceding such an act to be charged, it is set forth and described with that definiteness which good pleading requires, and which would be necessary to put the persons accused on notice as to the exact details of the act which they are charged with having committed, either as to place or manner. What is meant by "preventing"? "Prevent" is defined as to intercept; to hinder; to frustrate; to stop;



to thwart (Webst. Int. Dict.); to hinder from happening by means of previous measures; keep from occurring or being brought about, as an event or result; ward off; preclude; hinder, as to prevent the escape of a prisoner; to stop in advance, as a person or thing from some act or operation; intercept or bar the action of; check; restrain (Stand. Dict.). An "act" is defined as "that which is done or doing; the exercise of power, or the effect of which power exerted is the cause; a preponderance; a deed" (Webst. Int. Dict.); "something done or established" (Bouv. Law Dict.). From these definitions, it is impossible to come to any other conclusion than that a statement to the effect that one person was prevented from doing something by the conduct of another person embraces the idea that the latter person necessarily committed an act of some character. This being true, when the indictment alleged that the persons accused prevented the sheriff from removing a prisoner from jail, it alleged that such persons had committed an act; and therefore the demurrer, which simply raised the point that the indictment did not charge that an act had been committed, was not well taken. As the indictment charged that an act was done in a violent and tumultuous manner, it was sufficient as against a general demurrer, and also as against the special demurrer which was filed to the same. We do not mean to say that this indictment is by any means perfect, or that, as against it, a special demurrer, raising the question as to whether the act alleged should not be described with greater particularity, would not have been well taken; but we are clear that, as against the demurrers filed to the same, the indictment was sufficient, and that there was no error in overruling the demurrers. It is a well-settled rule in this State that the language of an indictment is to be interpreted liberally in favor of the State. Pen. Code, § 929; *Studstill v. State*, 7 Ga. 2, 16. It follows necessarily from this that a demurrer raising special objections to an indictment should be strictly construed against the pleader.

2. The evidence establishes that a number of persons assembled together, some of them being armed with deadly weapons; that the express purpose for which they assembled was to prevent an arresting officer from removing a prisoner from jail; that they did prevent him from doing so until the arrival of the

military, which overawed the assemblage, and aided the sheriff in removing the prisoner. The evidence further discloses the use of threatening language on the part of some members of the crowd, indicating a purpose to resort to the most extreme measures (even to bloodshed) to prevent the prisoner being removed; that the members of the crowd assembled at a given signal (the ringing of a bell), showing that the movement must have been preconcerted—this purpose being further manifested by the fact that some of the members of the crowd left their occupations, and came from various quarters of the town, in response to the ringing of the bell. Do these facts make out the offense of riot, as defined by our Code, which definition, as we have seen, is not materially different from that of the common law? A consideration of the adjudicated cases will demonstrate that the conduct of the persons accused in the present case was of such a character as to warrant their conviction for riot. The exact question to be ascertained, as will have been gathered from the above recitals, is whether an assemblage of persons who commit no overt act of violence, but still do some other act in such a way that it is calculated to bring about a breach of the peace or terrify the people, are guilty of the offense of riot. Conceding that neither the indictment nor the evidence authorized a conviction for that class of riot which is committed by the doing of an unlawful act of violence, we shall endeavor to show that the evidence in the present case authorized a conviction under the second count in the indictment. To sustain a conviction under that count, it is not necessary to show that the act done was unlawful. *Carnes v. State*, 28 Ga. 192. In the case of *Jacobs v. State*, 20 Ga. 841, that portion of the opinion of Lumpkin, J., which deals with the subject of riot is *obiter*, but any opinion expressed by that able jurist is valuable in arriving at a proper conclusion. There the evidence did not show that any of the defendants struck the prosecutor, but it did show that they threatened to whip him, and otherwise acted in a violent and tumultuous manner. They, however, committed no specific act of violence. Judge Lumpkin was of opinion that the defendants could have been convicted under the second branch of the definition of riot; saying that "their conduct was violent, tumultuous, and certainly unjustifiable, if not unlawful." In *Bar-*

ron v. State, 74 Ga. 833, it was held that evidence would not warrant a conviction for riot which showed merely that, "though their conduct may have been tumultuous, it was not violent." The use of the word "conduct" in the two foregoing quotations is significant, as showing that, under the second branch of the definition of the offense of riot, the gist of the offense is the character of the conduct of the persons charged with the offense. In the case of *Sanders v. State*, 60 Ga. 126, the defendants convicted, with others, assembled at a certain house, all being armed. They were in search of some one, though they had no warrant for his apprehension. The owner of the house, seeing they were bound to come in, invited them to enter and join the family at breakfast. They did so, and behaved rudely at the table. The man of the house was frightened, and tried to pacify them. He had before this made a fire for them in the yard, and, on account of their boisterous manner, had offered to aid them in their search. The court expressed the opinion that the facts made a weak case of riot, and in this opinion we share, but it cannot be seriously contended that the facts of the present case do not make a much stronger case of riot. The cases of *Bolden v. State*, 64 Ga. 361, and *Fisher v. State*, 78 Ga. 258, were dealing with the offense of riot as defined in the first part of the section of the Penal Code, above quoted, and hence the court properly addressed itself to the question as to whether or not an unlawful act of violence was committed. There is nothing in those cases which could be construed as authority for the proposition that violent and tumultuous conduct, such as threats, the exhibition of arms, menacing gestures, and the like, by means of which a desired object was accomplished, would not constitute riot, under the second branch of the definition of that offense. From 1 Hawk. P. C., p. 295, § 5, we quote the following: "However, it seems to be clearly agreed that in every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people—as the show of armor, threatening speeches, or turbulent gestures." It would follow from this that if these things were done, or similar things, calculated to terrify the people, the offense would be made out. In the case of *Clifford v. Brandon*, 2 Camp. 358, it

was held that "if a number of persons, having come to the theater with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual or doing any injury to the house, they are, in point of law, guilty of a riot." In *State v. Jackson*, 1 Speer, 13, it was held that the possession of a club, and the use of threatening language, constituted such a show of force as would make out the offense of riot. In the case of *Commonwealth v. Runnels*, 10 Mass. 518, it was ruled that "if the offense consisted in going about armed, without committing any act, the words '*in terrorem populi*'" should be alleged in the indictment; and it was said in the opinion that "to disturb another in the enjoyment of a lawful right is a trespass, and, if it is done by numbers unlawfully combined, the same act is a riot." Under the Indiana Statute, the commission of an "act in a violent and tumultuous manner" by three or more persons is riot. In *State v. Brown*, 69 Ind. 95, it was held that "persons conducting a *charivari*, or serenade with balls, horns, tin pans, guns, etc., are guilty of a riot." In this case the evidence did not show the commission of any specific act of violence, but showed merely general conduct of a violent and tumultuous nature. In *Bankus v. State*, 4 Ind. 114, it was held that where several persons marched back and forth along a highway, blowing a horn, and singing songs and hallooing, they were guilty of riot, under a statute declaring that a lawful act done in a violent and tumultuous manner is riot. The court said that they regarded the case as a plain, but not an aggravated, case of riot. In *State v. Acra*, 2 Ind. App. 384, 28 N. E. Rep. 570, it was ruled that an indictment which alleged that three persons did, in a riotous, violent, and tumultuous manner, unlawfully attempt to commit a violent injury on the person named, by violently and unlawfully threatening to beat, cut, and shoot such person, stated facts which sufficiently charged the offense of riot. In the old case of *Reg. v. Soley*, 11 Mod. 115, Lord Holt says that "if a number of men assemble with arms, *in terrorem populi*, though no act is done, it is a riot." (citing *Howard v. Bell*, Hob. 91); also, "if three men come out of an ale house, and go armed, it is a riot" (citing Y. B. 3 Hen. VII, pl. 1).

See, also, 2 Bish. New Crim. Law, § 1147; 2 Whart. Crim. Law (10th ed.), § 1540; Clark, Crim. Law, p. 342; 1 Russ. Crimes, p. 555; 2 Arch. Cr. Prac. & Pl., § 588, note 1; Hocn. Crimes, § 796; May, Crim. Law, § 204; Desty, Crim. Law, § 98a. From these authorities we think the principle is plainly deducible that if a number of persons assemble to prevent an arresting officer from removing a prisoner, and do actually prevent him, by intimidation arising from the possession of arms, and the use of threats to shoot and kill, it is a riot—and an aggravated one, at that—though no specific act of violence be committed. This is such violent and tumultuous conduct as amounts to a breach of the peace, and is calculated to terrify the people, and hence it can be properly denominated "riot." That the plaintiffs in error could have been convicted, though they had no arms and used no threats, if they were in fact members of the assembly, and shared in the common purpose, is well settled by the authorities. *Clifford v. Brandon*, 2 Camp. 358; *Rex v. Hunt*, 1 Keny. 108; *State v. Straw*, 33 Me. 554; *Williams v. State*, 9 Mo. 270; 2 Bish. New Crim. Law, § 1153. See, also, the notes to the case of *State v. Jenkins*, 94 Am. Dec. 138. The evidence amply warranted a conviction under the second count in the indictment.

3. The motion for a new trial contained various grounds. Those complaining of the refusal of the court to charge certain requests are without merit, for the reason that all of the requests contained propositions which either were not sound law, or not adjusted to the facts of the case. Portions of the charge of the judge which were excepted to were substantially in accordance with what is above ruled. The remaining grounds of the motion complain of errors alleged to have been committed in admitting evidence. In three of these grounds the evidence objected to is not set forth, but reference is made to the brief of evidence to ascertain what was the evidence objected to. According to repeated rulings of this court, such grounds will not be considered. Three of the grounds set forth the evidence objected to. This evidence consisted of declarations made by persons in the crowd, others than those on trial. Objection was made to this evidence on the ground that it was irrelevant, and that the declarations were made after the sheriff had abandoned

his intention of removing Delegal from jail. It is not necessary to cite authority to establish the proposition that all persons who compose a riotous assembly are bound by every declaration made by any member of that assembly as long as such assembly continues. The evidence in this case shows that the riotous assembly commenced at the ringing of a bell in the forenoon, and continued practically throughout the day; and therefore declarations made by the rioters at any time during the day would, under the principle above referred to, be admissible in evidence against the others. The fact that the riot in the forenoon had taken such shape that the sheriff had determined not to risk removing the prisoner would not render inadmissible declarations made after he had come to this determination, which were calculated, in their nature, to throw light upon the motive and intention of the assembly at some previous period of the day.

Judgment affirmed.

All the justices concurring, except LUMPKIN, P. J., and FISH, J., who dissented.

LUMPKIN, P. J., and FISH, J. (dissenting). The only point of difference between ourselves and the majority is whether or not the demurrer properly raises the objection that the indictment fails to set forth the offense with that degree of certainty which the law requires. We all agree that, as against a demurrer itself sufficient in the respect indicated, the indictment would not be good. The single question at issue should, therefore, be determined by ascertaining the true intent and meaning of the language used in the demurrer. We of the minority do not think its purpose was merely to set up that the indictment charged no act at all. If we entertained this view, we would not hesitate to concur in the conclusion reached by our Brethren, but we do not believe they have given to that language its correct interpretation. Had the words employed in the demurrer been that the indictment did "not allege any act done in a violent and tumultuous manner." there would be much force in the position that the sole point of objection was as above stated, but the addition of the words "which prevented" throws a clear and strong light upon the

pleader's intention. Giving to the words last quoted the only signification they could reasonably have been designed to have, the true meaning of the demurrer is that which would be conveyed by the words "the indictment fails to allege that any act was done by which the sheriff was prevented from removing the prisoner;" and this would be the equivalent of saying that the indictment does not set forth the particular act or acts, or specify the means, by which the prevention in question was accomplished. We entertain no doubt that this was the objection to the indictment which the demurrer was intended to present, and we think it did present it with sufficient clearness. In other words, we are of the opinion that the point is well made that the act charged in the indictment, viz., prevention, "was not set forth with sufficient particularity." While a charge that a person was prevented from doing a designated thing is, in one sense, undoubtedly the expression of a mere conclusion, we cheerfully grant that in another sense prevention is properly termed "an act." However, it is an act which can be done in many and very different ways. This is certainly true of the particular act of prevention charged in the present case, and, therefore, if the accused properly demanded specific information as to the kind of prevention with which they were charged, they were entitled to have it. As to the doctrine announced in the last sentence, we are all of one faith. It is only in the application of it that we divide; two of us going to the right, and the remaining four to the left.

NOTES (by J. F. G.).—Before drafting, or attacking an indictment for riot, the statute governing the case should always be carefully examined, that both the common law and the statutes are taken into consideration. As to indictments upon statutory crimes see 11 Am. Crim. Rep. 506-518. Without reviewing the many authorities as to indictments for riot, we would call attention to the two following cases:

In *Whiteside and others v. People*, 1 Ill. 4 (Beecher's Breese, 21), decided at the December Term, 1819, in reversing a conviction for riot, the court said:

"On the third point, the charge in the indictment is, that the defendants made a great noise and disturbance of the peace. This, the court considered too vague and uncertain. In criminal proceedings, the charge should be distinct and positive, and the way and manner in which the great noise and disturbance of the peace was made, should have been stated." (In the opinion the word "considered" is given in the past tense as we give it here.)



In *Blackwell v. State*, 30 Tex. Ct. App. 672, 9 Am. Crim. Rep. 532, the information charged that "on the 25th day of May, 1891, in the County of Waller and State of Texas, one Harvey Blackwell . . . did then and there unlawfully engage in a riot with one Fenton Moore, Isaac Huff, Tom Huff, Alfred Eckles, and various other persons, who had assembled at the residence of L. D. Thompson; and he, the said Harvey Blackwell, did then and there, acting together with said Fenton Moore, Isaac Huff, Tom Huff and Alfred Eckles, and various other persons, disturb the inmates of said L. D. Thompson's residence by the discharge of firearms in the immediate vicinity of the said L. D. Thompson's residence, . . . against the peace and dignity of the state." In reversing the judgment of conviction the court said:

"It will be noticed that in the information, as set out above, it is alleged that the defendant did then and there unlawfully engage in a riot with other parties named. This allegation is simply a conclusion of law, and not an allegation of fact, and does not supply the requisite allegation, that the parties unlawfully assembled together; nor is its defect cured by the addition that defendant 'engaged in the riot with the other parties named, who had assembled at the residence of Thompson.' This is also a conclusion of law upon the part of the pleader. We are of opinion that the indictment, to have been sufficient, should have alleged that the defendant and others unlawfully assembled, and after that it should have stated for what purpose they assembled, and then it should have set out the unlawful act done or attempted by the parties after the unlawful assembly together."

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MARTIN v. STATE.

115 Ga. 255—41 S. E. Rep. 576.

Decided April 29, 1902.

*Riot: \* Sufficiency of indictment in absence of special demurrer—One defendant alone found guilty.*

Where, under an indictment charging two named persons, "together with others," with the offense of riot, one of the persons named was convicted and the other acquitted, the conviction will be upheld when the evidence shows that any other person capable of committing the crime participated with the person convicted in the criminal acts charged in the indictment. Failure to allege in the indictment that the other persons were unknown would be cause for quashing the same on special demurrer, but would not constitute any reason either for arresting the judgment or granting a new trial.

(Syllabus by the Court.)

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\*See *Riot* in Table of Topics.

Error to the Superior Court, Liberty County; Hon. P. E. Seabrook, Judge.

Sandy Martin, convicted of riot, brings error. Affirmed.

*Donald Fraser and B. A. Way*, for the plaintiff in error.  
*Livingston Kenan*, Solicitor General, for the State.

COBB, J. Sandy Martin was convicted of the offense of riot. The indictment contained two counts. The first charged that "Sandy Martin and Stephen Martin, together with others," committed an unlawful act of violence which constituted riot, and the second count charged that "Sandy Martin and Stephen Martin together with others" were guilty of certain acts done in a violent and tumultuous manner, constituting riot. Upon the trial the jury returned a verdict of guilty as to Sandy Martin, and not guilty as to Stephen Martin. A motion for a new trial filed by Sandy Martin having been overruled, he excepted and brought the case to this court by writ of error.

The controlling question in the present case is whether the conviction of the plaintiff in error was warranted by the evidence, when the other person named in the indictment was acquitted and the evidence showed that the acts alleged in the indictment were committed by the plaintiff in error jointly with other persons not therein named. One person may be indicted for a riot or conspiracy, but the general rule is that the names of the other persons who participated with him in the unlawful acts must be set forth in the indictment. It was, however, under the common law, permissible to set forth the name of one person and charge that he committed the offense with other persons unknown; and if the proof showed that the accused participated with one or more persons in an act of conspiracy, or with two or with two or more persons in an act of riot, he could be convicted. If, however, several persons were indicted for a riot, and the proof showed the guilt of only one or two, all must have been acquitted. "On an indictment for a riot against three or more, if a verdict acquit all but two, and find them guilty, or on an indictment for a conspiracy, if the verdict acquit all but one, and find him guilty, it is repugnant and void as to the two found guilty in the first case, and as to the one found guilty in the sec-

ond, unless the indictment charge them with having made such riot or conspiracy *simul cum aliis juratoribus ignotis*; for otherwise it appears that the defendants are found guilty of an offense whereof it is impossible that they should be guilty, for there can be no riot where there are no more persons than two, nor can there be a conspiracy where there is no partner. Yet it seems agreed that if twenty persons are indicted for a riot or conspiracy, and any three found guilty of the riot, or any two of the conspiracy, the verdict is good." 2 Hawk. P. C. 621, 622. See, also, 2 Bish. New Cr. Proc., § 998 (3); 2 Clark & M. Crimes, p. 1008; *State v. Brazil*, Rice, 257; *Commonwealth v. Berry*, 5 Gray, 93; 2 Whart. Cr. Law (9th ed.), § 1545; Whart. Cr. Pl. (9th ed.), § 306; *Rex v. Scott*, 3 Burrow, 1262, 1 W. Bl. 291; *Turpin v. State*, 4 Blackf. 72; *Rex v. Heaps*, 2 Salk. 593; *Hardebeck v. State*, 10 Ind. 459. There is no statute in Georgia changing the rules of the common law with respect to the matter above referred to, except that in this State the joint act of only two persons constituted a riot (Pen. Code, § 354), and persons guilty of this offense may be separately tried (Pen. Code, § 969), in which latter case the acquittal of the one first tried will not operate to acquit the other. *Rachels v. State*, 51 Ga. 375. Where it is necessary in an indictment to name persons other than those indicated, an allegation such as "divers others" or "several others," without stating that they are unknown, will be bad on special demurrer. *People v. Fish*, 1 Shield. 537; *State v. Irvin*, 5 Blackf. 343. And in *State v. O'Donald*, 1 McCord, 532, 10 Am. Dec. 691, where a true bill was returned against two persons and "divers other persons, to wit, to the number of five," without alleging that they were unknown, the court went so far as to hold that a motion in arrest of judgment would be sustained. In the present case the indictment was good on its face, the offense being charged against two named persons. That it was subject to special demurrer for not naming the other persons referred to in the indictment as having participated in the riot, or not stating that their names were unknown, does not admit of question. For, as it is not charged that their names were unknown, *non constat* but that they were known; and it has been often held that proof that the names were known when the indictment alleges that they were

not would be reason for acquitting the accused. See the authorities cited *supra*. See, also, *Nelms v. State*, 84 Ga. 466, 468, 10 S. E. Rep. 1087, 20 Am. St. Rep. 377, where this principle is referred to in passing. We do not, however, in the present case find it necessary to make any ruling on this point. Inasmuch as the plaintiff in error elected to go to trial on the indictment, the question is, can he be convicted when the evidence shows that he, together with other persons not named in the indictment, committed the acts charged therein? In *Rex v. Sudbury*, 12 Mod. 262, case 473, 1 Ld. Raym. 484, it appeared that several persons were indicted for riot, and all but two were acquitted. The judgment was arrested, but Lord Chief Justice Holt remarked that if the indictment had been that the defendants, "with divers other disturbers of the peace," had committed the riot, the King might have had judgment. In 1 Strange, 195, the case of *Reg. v. Herne*, which seems to be an unreported case, is referred to. In that case the indictment charged that Herne, with A. "*et multis aliis*," conspired to accuse B. of a crime. The jury found a bill as to Herne, with an ignoramus as to A. Herne moved in arrest of judgment. The court overruled the motion, on the ground that Herne could be convicted under the "*cum multis aliis*," though no bill was found against A. Another unreported case is referred to in the same volume and on the same page, where several were indicted for a riot, "*cum multis aliis*," and two were found guilty. It was objected that there must be three to make a riot, but "upon the *cum multis aliis* judgment was given against the defendants." See, also, in this connection, the notes in 1 Russ. Crimes, pp. 512, 513. As it is the universal practice, and as proper pleading requires, that, where it is necessary to refer to persons in an indictment, their names, if known, be set out, the inference is that where the names are not set out they are unknown, although this fact may not be affirmatively stated in the indictment. And it would seem that, in the absence of a special demurrer, the presumption would be after verdict that the names were not known, where the allegation is that the accused "and others," or "together with others," committed the offense. At any rate, the plaintiff in error elected to go to trial on the indict-

ment as it stood, and he thereby waived the defect, which was one of form merely, and not of substance. Had the word "unknown" been added to the allegation in reference to the other persons who committed the offense, the effect would have been exactly the same, for this would have allowed the State to prove participation by the accused with any other person capable of committing the crime. The addition of the word would not have restricted the investigation in the slightest degree. And while the plaintiff in error would have been entitled to an indictment perfect in every respect, had he called for it at the proper time and in the proper way, the omission of the word in question has worked no such injury to him as to entitle him either to a new trial or an acquittal. It follows from what has been said that, even if a formal motion in arrest of judgment had been made, it would not have been well taken; although the motion for a new trial cannot, as was suggested in the argument, be treated as a motion in arrest of judgment. *Boswell v. State*, 114 Ga. 40, 42, 39 S. E. Rep. 897. The motion for a new trial is without merit. The evidence objected to was properly admitted. The charges complained of were not erroneous. Failure to charge on the subject of impeachment of witnesses will not, in the absence of a written request so to do, require a new trial. The verdict was amply supported by the evidence.

Judgment affirmed.

LEWIS, J., absent on account of sickness.

NOTE (by J. F. G.).—In section 996, of McClain on Criminal Law, the author says:

"One alone cannot be convicted under a charge of riot, unless it is shown that others were engaged in the unlawful act; but even if three or more be indicted, it is not necessary to prove three of them guilty, if the charge is of acting with others described as unknown, and it appears that three or more were engaged in the unlawful proceeding. As in other cases it seems to be necessary, however, where the averment is that the other rioters are to the grand jurors unknown, to prove that fact. And the fact that others engaged in the riot, or the result as between the defendant and those so engaged, is immaterial. As in the case of conspiracy, it is not necessary that others be convicted, before one defendant who is proved guilty of the offense is sentenced."

*Averments as to names unknown.*—It is well settled, that when, in

an indictment, a person is described as of name unknown, if it appears upon the trial, that the name of such person was known to the grand jury at the time the indictment was presented, the variance will be as fatal as though such person was described by a name other than his own.

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TRIPP et al. v. STATE.

109 Ga. 489—34 S. E. Rep. 1021.

Decided January 24, 1900.

Riot:\* *Joint participation in the act—Review of evidence.*

To commit the offense of riot, the joint action of two or more persons is required; and where, in a given case, it is shown that, while two persons were in company, one was guilty of an unlawful act of violence, and the evidence fails to disclose any participation by the other in such act, and there were no circumstances from which a common intent to do the act might be inferred, a conviction cannot lawfully stand.

(Syllabus by the Court.)

Error to the Superior Court of Morgan County; Hon. John C. Hart, Judge.

Henry Tripp and Albert Tripp were convicted of riot and sued out a writ of *certiorari*. The writ being dismissed, they bring error. Reversed.

*W. R. Mustin*, for the plaintiffs in error.

*H. G. Lewis*, Solicitor General, and *E. W. Butler*, for the State.

LITTLE, J. Tripp and another presented a petition to the judge of the Superior Court for *certiorari*. The judge sanctioned the writ and it appeared by the answer of the judge of the County Court that Henry Tripp and Albert Tripp were indicted in the Superior Court of Morgan County for the offense of riot; that the same was transferred to the County Court, where the defendants were tried. The bill of indictment charged the defendants with committing "an act in a violent and tumultuous manner, by riding by the dwelling house of L. T. Osborn,

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\*See Riot in Table of Topics.

and firing off pistols and shooting into a tenement house of said Osborn." The evidence tended to show: That the defendants were in a buggy traveling the public road in front of the house of Osborn. That Mrs. Osborn was standing in the porch of her residence, when the two defendants drove rapidly by. That two children were in the road, and Mrs. Osborn found it necessary to call them to get out of the way of the rapidly passing vehicle. After the defendants had driven 100 or more yards beyond the house, the one who was not driving fired a pistol in the air, and a little further on fired a pistol at a tenant house on the place. The horse was being driven as fast as he could trot. The one who was seated on the left side of the buggy did the firing. They did not seem to be drunk, nor were they boisterous, other than in the driving and shooting. The defendants were convicted, and the question presented by their petition for *certiorari* is, was the conviction lawful, under the evidence submitted? We think not. The conduct of the defendant who did the shooting was most reprehensible, and we have no doubt that the good lady who witnessed these occurrences was not only shocked, but frightened, and there ought to be found a way to put a stop to such conduct; but we are clear that neither of the defendants were guilty of the offense of riot, which by section 354 of the Penal Code is thus defined: "If two or more persons do an unlawful act of violence, or any other act in a violent and tumultuous manner, they shall be guilty of a riot, and be punished as for a misdemeanor." There can be no question but that the firing of a pistol towards a tenement house is an unlawful act of violence, but in the commission of the offense of riot there must be a joint action of two or more persons. *McPherson v. State*, 22 Ga. 488; *Prince v. State*, 30 Ga. 27; *Robinson v. State*, 84 Ga. 680, 11 S. E. Rep. 544; *Stafford v. State*, 93 Ga. 207, 19 S. E. Rep. 50; *Perkins v. State*, 78 Ga. 316; *Stokes v. State*, 73 Ga. 816; *Bolden v. State*, 64 Ga. 361. The act charged in this case is the rapid driving on the public road, and the firing of the pistol. The evidence shows that the horse which was being driven went as fast as he could trot. This is not itself unlawful, nor an act of violence, nor necessarily an act done in a tumultuous manner. If it be said that coupled with such driving was the firing of the pistol, the reply is that the evidence in no way



connects the driver with the discharges of the pistol, and there is nothing in the evidence which tends to show that the firing was done in pursuance of a common intent. While we are prepared to condemn such conduct in the most emphatic terms, we cannot, as a matter of law, rule that the defendants committed a riot. If the evidence connected both parties with the firing of the pistol, it might be otherwise; but as it was not shown that the driver of the horse had any connection with the act of firing, and as the joint action of at least two persons is required to constitute the offense, it is manifest that the conviction cannot stand, and on the hearing the *certiorari* should have been sustained.

Judgment reversed.

All the justices concurring.

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HUNT et al. v. STATE.

116 Ga. 615—42 S. E. Rep. 1004.

Decided December 9, 1902.

*Riot: \* Review of evidence—Motion for a new trial.*

The evidence introduced by the State fully warranted a conviction of the accused for the offense of riot, and, so far as appears, the court did not err in refusing to grant them a new trial.

(Syllabus by the Court.)

Error to the Superior Court of Haralson County; Hon. C. G. Janes, Judge.

A. J. Hunt and others, being convicted of riot, bring error. Affirmed.

*Griffith & Weatherby and Craven & Hutcheson*, for the plaintiffs in error.

*W. T. Roberts*, Solicitor General, and *Edwards & Ault*, for the State.

SIMMONS, C. J. The plaintiffs in error were brought to trial for and convicted of the offense of riot, under an indictment

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\*See Riot in Table of Topics.

charging that on a day specified they, "with force and arms, did, in a violent and tumultuous manner curse, abuse, and drive away from the home of W. M. Jones J. H. West and Henry Jones, contrary to the laws of" this State, etc. A motion for a new trial was made by the accused, but proved unproductive, and they seek at out hands a decision as to its merits. The case made out by the State was, in brief, substantially as follows: On the day named in the indictment W. M. Jones was in possession of a house he had rented from West, who was the agent of another, claiming title to the farm upon which this house was located. Two of the plaintiffs in error appear to have been under the impression that they were the true owners of the premises, while another of them asserted a claim based on the doctrine of emblements. He had a son, who apparently was devoted to his cause. The four appeared on the scene prior to the breakfast hour of W. M. Jones. Two of them were armed with guns, but in a conciliatory spirit approached West and Henry Jones, who were present, and also armed, and "proposed to settle this matter without using guns." This proposition was accepted, and the guns were "stacked" with a view to talking the matter over. The conference terminated in a fight without weapons between West and one of the accused, and after an indecisive struggle the latter took his departure, and was followed by the other members of his party, while West went into the house. The accused almost immediately returned, however, each armed with a gun, and commenced firing, at the time uttering threats and curses, and ordering the inmates of the house to at once leave the premises. West and Henry Jones, against whom this mandate was specially directed, then retired in good order. W. M. Jones and his family were then driven away also. He had, the night previous, agreed to move off the place, and had asked one of the accused to secure him another house. He was compelled, against his will, to move that day. No testimony was offered in behalf of the accused, though each made a statement to the jury in which he gave his version of what occurred. Under the evidence relied on by the State, it cannot be seriously insisted that the verdict of guilty was unwarranted, so we will pass to a consideration of the special grounds of the motion for a new trial. The court declined to

admit evidence offered for the purpose of showing the title under which two of the accused laid claim to the premises over the possession of which the disturbance to the peace of the State arose. Obviously, this evidence was wholly irrelevant, for, however good a title they may have had to the premises, this would not justify them in proceeding in a riotous and tumultuous manner to take possession of the same. Another complaint is that the court refused "to allow defendants to prove by W. M. Jones that he was getting his things out of his house when defendants got there that morning." If such was the case, the disturbance created by them was all the more inexcusable. Peaceable preparations for the moving of the household effects are not to be regarded as a signal for, or as justifying, a riot. Again, it is insisted that the court erred in not permitting counsel for the accused to ask W. M. Jones the question, "You made arrangements with him [one of the accused] to carry your things?" We cannot undertake to say that this ruling operated to the prejudice of the accused, since what answer was expected of the witness is not made to appear. *News Co. v. Mencken*, 115 Ga. 1017, 42 S. E. Rep. 369. Nor are we prepared to hold that injury resulting from refusing to allow one of the accused to make a statement of "all that took place during the time the offense was alleged to have been committed, and by confining him to a statement of just what he did." What he desired, but was not allowed, to state to the jury, should have been fully set forth in the motion for a new trial, in order that we might be enabled to pass intelligently upon the question whether or not the trial judge abused his discretion in the premises.

Judgment affirmed.

All the justices concurring, except LUMPKIN, P. J., absent.

## GUNNING v. PEOPLE.

86 Ill. App. 174—32 Chi. Legal News, 323.

Opinion filed December 19, 1899.

STATUTES: *General and special statutes—Statutory construction—  
"Punishment" defined.*

1. A statute providing punishment, for enumerated or particular acts, takes such matters out of the operation of a general penal statute, covering the same subject generally.
2. A statute providing for a fine and removal from office, for "any palpable omission of duty" on part of a public officer, is not operative against an assessor, when there is another act defining the duties of assessors and providing punishment for neglect of such duties.
3. A fine "to be recovered in an action of debt, in the name of the people of the State of Illinois" is a punishment.
4. Where a word is used several times in the same chapter of a statute, "and the sense in which it is used clearly appears in some sections, that may materially aid in determining the sense in which it is used in the other sections of the same chapter."

Appellate Court of Illinois, First District.

Writ of error to the Criminal Court of Cook County; Hon. Theodore Brentano, Judge.

Richard C. Gunning was convicted of misfeasance in office. Reversed.

*Edward H. Morris*, for the plaintiff in error.*Charles S. Deneen*, State's Attorney, and *W. M. McEwen*, Assistant State's Attorney, for the State. *A. S. Trude*, of counsel.

Mr. Presiding Justice Horton delivered the opinion of the court.

At the February term, 1898, the grand jury of Cook County returned an indictment containing thirty counts against plaintiff in error, charging him with palpable omission of duty in his office as assessor of the town of South Chicago, in said county.

The first two counts in the indictment charging a failure to produce assessment books before the town board of review were quashed. A motion by plaintiff in error to quash the other

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P. J., absent.

counts was overruled and the case tried by a jury upon the remaining twenty-eight counts. Fourteen of these counts charge a palpable omission of duty on the part of plaintiff in error in that he, as a member of the town board of review of the town of South Chicago, wilfully voted in the affirmative to adjourn the said board of review *sine die*, and by so voting did adjourn said board *sine die* before it had passed upon and heard the complaints filed before it. The remaining counts charged that he was guilty of a palpable omission of duty, in that he did not, between May 1, 1897, and July 1, 1897, assess all of the property, real and personal, subject to assessment in the town of South Chicago.

The trial resulted in a verdict finding the plaintiff in error guilty, and after overruling a motion for a new trial and a motion in arrest of judgment, the court entered judgment on the verdict and imposed a fine of two thousand dollars upon the plaintiff in error, to reverse which he sued out this writ of error.

All of the counts of the indictment except the two which were quashed, charge a violation of section 208, chapter 38, Revised Statutes, being the Criminal Code. The indictment, conviction and fine are under this section. The duties or acts which it is alleged the defendant did not perform are those required by sections 76 and 86, Revenue Act (Ch. 120). Said section 208 of the Criminal Code, eliminating that part not applicable to this case, is as follows:

"Every person holding any public office (whether State, county or municipal), trust or employment, who shall be guilty of any palpable omission of duty . . . or who shall be guilty of wilful and corrupt oppression, malfeasance or partiality, where no special provision shall have been made for the punishment thereof, shall be fined not exceeding \$10,000 and may be removed from his office, trust or employment."

Said section 208 is general in its terms, but it is conceded in the printed arguments filed herein that it does not reach such cases as this, if some special provision has been made to cover the offense here charged.

Said section 76 of the Revenue Act provides that assessors shall, between the first day of May and the first day of July in each year, actually view and determine, as near as may be, the

actual cash value of each lot or tract of land listed for taxation, etc.

Said section 86 provides, in substance, that the assessor, clerk, and supervisor of each town shall meet on the fourth Monday of June, consider complaints as to assessments, revise and correct the same, and adjourn from day to day until they shall have finished the hearing of all cases presented to them.

The indictment charges that plaintiff in error is guilty of the offense described in each of these sections, and the jury found him guilty. The Revenue Act, which provides the duties of assessors, also provides certain penalties to be imposed upon officials who violate its provisions. The two sections applicable to assessors are as follows:

§ 287. "If any officer shall fail or neglect to perform any of the duties required of him by this act, upon being requested so to do by any person interested in the matter, he shall be liable to a fine of not less than \$10, nor more than \$500, to be recovered in an action of debt in the Circuit Court of the proper county, and may be removed from office at the discretion of the court, and any officer who shall knowingly violate any of the provisions of this act shall be liable to a fine of not less than \$10 nor more than \$1,000, to be recovered in an action of debt, in the name of the People of the State of Illinois, in any court having jurisdiction, and may be removed from office, at the discretion of the court, and said fines, when recovered, shall be paid into the county treasury."

§ 288. "Every county clerk, assessor, collector or other officer, who shall in any case refuse or knowingly neglect to perform any duty enjoined upon him by this act, or who shall consent to or connive at any evasion of its provisions, whereby any proceeding required by this act shall be prevented or hindered, or whereby any property required to be listed for taxation shall be unlawfully exempted, or the same be entered upon the tax list at less than its fair cash value, shall, for every such offense, neglect or refusal, be liable, on the complaint of any person, for double the amount of the loss or damage caused thereby, to be recovered in an action of debt, in the name of the People of the State of Illinois, in any court having jurisdiction, and may be removed from his office, at the discretion of the court."

If in the two sections last quoted there is "special provision" for the "punishment" of an assessor, within the meaning of the terms used in said section 208 for the offense detailed in this indictment, then this conviction of plaintiff in error cannot be sustained. Or, in other words, would the imposition of a fine and the removal from office, under the provisions of said two sections, or either one of them, be "punishment" in the sense in which that word is used in said section 208 of the Criminal Code?

In the printed argument filed in behalf of the defendant in error it is contended that plaintiff in error could not have been successfully prosecuted under the first part if said section 287, which is there quoted, nor under said section 288. But there is in such printed argument no reference to, or discussion of, the last part of said section 287. That should be construed as being as separate and distinct from the first part of the section as though it was a separate section.

"Punishment," as defined in the Century Dictionary, is "pain, suffering, loss, confinement or other penalty inflicted on a person for a crime or offense, by the authority to which the offender is subject; a penalty imposed in the enforcement or application of law."

The same authority defines "Penalty" to be "suffering, in person or property, as a punishment annexed by law or judicial decision to a violation of law."

See, also, Bouvier's Law Dictionary; Potter's Dwarries on Statutes, p. 74; Anderson's Dic. of Law, 763; 4 Blackstone, 7; *Wolverton v. Taylor*, 132 Ill. 197, 206; *State v. Smith*, 7 Conn. 430.

In *Huntington v. Attrill*, 146 U. S. 657, 667, it is stated that "strictly and primarily, they (the words 'penal' and 'penalty') denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws." *United States v. Reisinger*, 128 U. S. 398, 402; *United States v. Chouteau*, 102 U. S. 603, 611.

When a word, which may in its application have different meanings, is used in a statute, the sense in which such word is used by the Legislature should control in construing and apply-



ing such statute. Where such word appears several times in the same chapter of the statute, and the sense in which it is used clearly appears in some sections, that may materially aid in determining the sense in which it is used in other sections of the same chapter.

The word "punishment" is used many times in said Criminal Code. Section 208b, which, with said section 208, is under the general heading of "misconduct of officers," provides that an officer guilty of fraud in the expenditure of public moneys shall be "punished" by fine, or by imprisonment, or by both. In some sections of said chapter 38 it is provided that "punishment" shall be by fine and imprisonment, as in sections 119, 42o, 54n and 120—in others by fine and imprisonment, as in sections 9e, 39m, 42h, 117-125b, 137e, 269d and 292—and in still others by fine only, the same as in said sections 287 and 288 of the Revenue Act, as in sections 9a, 9p, 9q, 541 and 269c.

A person could not be lawfully indicted and convicted of embezzlement under said section 208, because "special provision" has been made for the "punishment" of that offense. But certain phases of embezzlement may be punished by fine only. See sections 78 and 79 of the Criminal Code.

Neither can it be concluded from the fact that the fine provided for in said sections 287 and 288 of the Revenue Act are to be recovered "in an action of debt in the name of the People of the State of Illinois," that the penalty there imposed is not "punishment" within the meaning of that word as used in said section 208 of the Criminal Code. Section 269d of the Criminal Code provides that certain officers shall be punished by fine. Section 269g provides that such fine may be recovered in an action of debt in the name of the People in the same words used in said sections of the Revenue Act.

Again, said sections 287 and 288 of the Revenue Act provide that for the offenses there described a person found guilty may be removed from office. That is punishment. *Cummings v. State of Missouri*, 4 Wallace, 277.

In the *Missouri Case* a Roman Catholic priest was indicted and convicted in a Missouri State court for teaching and preaching without having first taken an oath prescribed by the Consti-

tution of that State. That was held by the Supreme Court of the United States to constitute punishment. (See p. 320, *et seq.*)

The penalties which might be imposed under said sections 287 and 288 of the Revenue Act, constitute "punishment" in the sense in which that word is used in section 208 of the Criminal Code. The indictment and conviction of plaintiff in error under said section 208 is erroneous.

Section 74 of the Criminal Code provides that "Whoever embezzles . . . shall be deemed guilty of larceny." Section 79 of that chapter provides that "If any . . . constable . . . shall fail or refuse to pay over any money collected by him . . . he shall be fined . . . or confined in the county jail," etc.

In *Stoker v. People*, 114 Ill. 320, said Stoker had been indicted and convicted under said section 74. There was no provision in that section, as there is in said section 208, relating to "special provisions . . . for the punishment" of a guilty party, and yet the Supreme Court says (p. 324): "It is true that the word 'whoever,' used in section 74, has a broad and comprehensive meaning, but at the same time it is unreasonable to believe that the Legislature intended that a constable should be prosecuted under both sections of the statute." The judgment in that case was therefore reversed and the cause remanded.

There can be no doubt of the fact that the defendant in the case at bar was liable to be prosecuted and convicted under the "special provisions" of said sections 287 and 288 of the Revenue Act. As it is said in the *Stoker Case*, it is unreasonable to believe that the Legislature intended that an assessor should be punished under said sections 287 and 288, and also under said section 208 of the Criminal Code. The reasoning in the *Stoker Case* is conclusive when applied in the case at bar.

For the reason indicated, the judgment of the Criminal Court must be reversed and the case remanded.

NOTES (by J. F. G.).—Except where the legislative intent is manifestly shown to the contrary, we may accept not only as axiomatic but as well established, the following rule:

1. Where a subject is legislated upon generally, and also in the same

statute special provisions, regulations or penalties are applied to particular portions of that subject, the special provisions control as to all that comes within their range.

2. Where there is a statute legislating upon a subject generally, and also another statute applying specific provisions to particular portions of that subject, the latter statute governs as to all matters coming within its terms.

In Endlich on Interpretation of Statutes, section 399, the author says:

"Where there is in the same statute a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

As announced by the Supreme Court of the United States.—In *United States v. Nix*, 189 U. S. 199, 23 Sup. Ct. Rep. 495, 47 L. Ed. 775, decided March 2, 1903, in the course of the opinion the court said:

"The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in *Townend v. Little*, 109 U. S. 504, 27 L. Ed. 1012, 3 Sup. Ct. Rep. 357, that special and general statutory provisions may subsist together, the former qualifying the latter. See, also, *Churchill v. Crease*, 5 Bing. 177; *Magone v. King*, 2 C. C. A. 383, 1 U. S. App. 267, 51 Fed. Rep. 525, and cases cited; *State v. Clarke*, 25 N. J. L. 54.

An illustrative case.—In the case of *People v. Davis et al.*, 30 Chi. Leg. News, 212, 3 Chi. Law Jour. (Weekly), 75, 15 Nat. Corp. Rep. 841, 57 Alb. Law Jour. 170, decided February 11, 1898, Judge Baker, presiding in the Criminal Court of Cook County, quashed an indictment based on a general conspiracy statute. After a review of the general law pertaining to conspiracy, showing that the acts complained of did not in fact amount to conspiracy, in closing the opinion he said:

"The views here expressed find confirmation in the following provision of our Criminal Code, section 158: 'If any two or more persons shall combine for the purpose of depriving the owner or possessor of property of its lawful use and management, or of preventing, by threats, suggestions of danger or any unlawful means, any person from being employed by, or obtaining employment from any such owner or possessor of property on such terms as the parties concerned may agree upon, such persons so offending shall be fined not exceeding \$500, or confined in the county jail not exceeding six months,' for under well-settled rules of construction it is but reasonable to infer that the Legislature in adopting section 158 as a section of the act of which section 46 was another section, intended to embody in section 158, all matter in relation to interference by combination and agreement between employee and employer, between capital and industry which it was thought proper to make the subject of a special criminal law."

The case of *People v. Davis* was one of more than ordinary interest, being considered a test case, in which special counsel was employed for the prosecution. It was argued both orally and by brief. The decision

was made by a judge of recognized ability, who now occupies a seat in the Appellate Court.

*The basis for this doctrine.*—In construing a statute, whenever the intent of the Legislature can be ascertained, from the same or other statutes, such legislative intent must be accepted. Where the attention of the Legislature is centered upon a particular branch or phase of a subject, and legislation is had upon it, it must be presumed that the intention of the Legislature is more clearly expressed as to that branch or phase of the subject, than in a statute where the entire general subject is considered as a unit, and in the enactment of which, some of its branches or phases may be temporarily overlooked. Furthermore, the Legislature is presumed to take cognizance of all existing statutes, enacted within the same legislative jurisdiction, and unless in enacting a law applying to a subject generally, it expressly repeals a former law applying to a particular branch or phase of the subject, such former law is considered to remain the same as though re-enacted as an exception to, or a special provision in the general law; unless the two statutes are clearly inconsistent with each other. This last proposition was passed upon in *Carpenter v. Russell*, — Okl. —, 73 Pac. Rep. 930, decided September 10, 1903. The following three paragraphs being the syllabus by the court:

1. All appeals from the probate court, when exercising its jurisdiction in purely probate matters, must be to the district court, regardless of whether the appeal presents a question of law only or both questions of law and fact.

2. Repeals by implication are not favored, and, when two statutes covering in whole or in part the same matter are not absolutely irreconcilable, effect should be given, if possible, to both.

3. A general act is not to be construed as applying to cases covered by a prior special act on the same subject.

See, also, *Ottawa v. Lasalle*, 39 Ill. 339.

*Other Illinois authorities on the general doctrine.*—*O. & N. W. R. Co. v. City of Chicago*, 148 Ill. 141, 35 N. E. Rep. 881; *People v. Rose*, 166 Ill. 422, 47 N. E. Rep. 64; *Dahnke v. People*, 168 Ill. 102, 48 N. E. Rep. 137; *Cantrell v. Seaverns*, 168 Ill. 165, 48 N. E. Rep. 186.

*Reasons why this doctrine should apply with special force in construing penal statutes.*—

No person shall be placed twice in jeopardy for the same offense; therefore a criminal prosecution should be based upon the statute which best fits the case, so that a conviction or acquittal can be pleaded in bar of later prosecution.

Penal statutes must be strictly construed, and limited to the matters and penalties, clearly coming within their provisions.

Where a legislature prescribes a penalty for a particular act or omission, none other can be lawfully imposed.

*It may sometimes be difficult to determine which of two or more penal statutes apply to a matter then under consideration; but such fact, does not give to the prosecuting attorney the right to proceed at random on either. To permit a prosecuting attorney to proceed at will under either statute would be to recognize in him law creating*

powers, and subject a free citizen to his arbitrary will. The power to declare what acts or omissions constitute statutory crimes, and to prescribe penalties, is with the Legislature. When close distinctions are drawn by the language used in the penal statute, such distinctions must be recognized by the courts; for no man should be convicted unless the matter charged be within the letter and spirit of the law. Again, if a Legislature carelessly permits penal laws to be so interwoven and confused that courts are unable to determine which statute applies in a stated case, the fault is with the legislative, and not with the judicial branch of government. Courts should administer laws as they find them and not as they would make them.

*Spasmodic legislation.*—Special legislation is often prompted by public clamor and excitement. A public wrong may occur for which a remedy at law is ample; but a sudden demand is made for enactment of a law to fit the case; and the damagogue of element, generally so abundant in legislative halls, introduces a bill for a new statute, written without taking into consideration existing laws. Thus, duplicates or triplicates may be entered on the statute books, rendering no additional aid to the public; but placing the law in a state of confusion, and burdening the courts with intricate and perplexing questions, where the law previously was clear and well settled.

*A marked instance* of this class of legislation occurred in 1877. Prompted by railroad labor troubles of that time, the Illinois Legislature enacted a special conspiracy statute as a remedy, and prescribed in it a punishment of both fine and imprisonment; but some of its provisions so closely resemble section 158 of the Criminal Code (*supra*) that it may be difficult to determine which statute applies. Here, for the same kind of offense one statute prescribes fine *and* imprisonment, while the other prescribes fine *or* imprisonment.

The statute books of Illinois contain not less than nine conspiracy statutes.

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## DUFFY v. PEOPLE.

197 Ill. 357—64 N. E. Rep. 308.

Opinion filed June 19, 1902.

*TRIAL: Bias of the trial judge—Weight of the evidence—Alibi.*

1. If the chief evidence tending to connect the defendant with the crime of assault is the unsupported testimony of the prosecuting witness that he identified them by their faces and voices, the conviction cannot be sustained where the defendants and four other witnesses testify to facts which prove an *alibi*.
2. In a trial for assault, where the evidence against the defendant is slight, it is not proper for the judge to put his personal exper-

lence in another case of assault into the scales against defendants, and to refuse to allow them to prove that the place where the alleged assault was committed was a public one and that there were persons within hearing and seeing distance.

*Duffy v. People*, 98 Ill. App. 34, reversed.

Appeal from the Branch Appellate Court for the First District—heard in that court on appeal from the Criminal Court of Cook County; the Hon. Theodore Brentano, Judge, presiding.

*Charles B. Stafford*, for the appellants.

*H. J. Hamlin*, Attorney General, and *Charles S. Dencen*, State's Attorney (*W. S. Elliott, Jr.*, of counsel), for the People.

Mr. Justice Ricks delivered the opinion of the court.

Appellants, Patrick Duffy and John Keim, were indicted with one Ole Olson in the Criminal Court of Cook County for an alleged assault to commit bodily injury upon one Henry Hornburg. A jury was waived by the defendants Duffy and Keim, and the issue submitted to the court. Olson was never arrested. The court found the appellants guilty, and sentenced them to the county jail, each for the term of ninety days, and to pay a fine of \$50 and costs. Appellants appealed to the Appellate Court. There the judgment was affirmed, and the defendants Duffy and Keim bring the record to this court for review.

It is urged that the finding is not justified by the evidence. The testimony of the complaining witness, Hornburg, is that he was proceeding homeward upon a South Halsted street car on the evening of December 13, 1899; that as he was about to alight therefrom, near Thirty-First street, Keim, coming from behind, pushed him from the car, jumped after him, and seized him, and that while Keim was thus holding him the defendant Duffy came up, and he, together with Keim, assaulted the prosecuting witness by striking him upon the head with some blunt instrument; that during this time Olson was standing near, and encouraging them in their acts. Hornburg testifies that during this scuffle he was able to see the parties face to face, and, having been acquainted with them some fourteen or fifteen years, he distinctly recognized them as the three defendants. The main question raised by the defendants is the correctness

of the identification by Hornburg, and it is also urged that there was no motive for the assault on the part of these defendants, and that the testimony establishes an *alibi* in their behalf. Hornburg's testimony is clear and positive that he identified them, not only by their faces, but by their voices as well. The testimony of Hornburg, however, is the only evidence tending to show that these defendants were at the place at the time of the assault or that they were in any way connected with it, except that there was testimony that, when Keim was arrested, Shober asked him what he was arrested for, and Keim replied, "For licking Hornburg," and that Shober then said, "You ought to have killed the — — —," using a vile name. We think it clear from the evidence that the assault took place in the evening, between 5:30 and 5:40. Both Duffy and Keim testified positively that they were not at the corner of Thirty-First and Halsted streets at the time of the alleged assault. Keim was employed on the 13th day of December at 9376 Ewing avenue, at the shops of the Hibben & Hill Company, and the evidence of the timekeeper of that company was to the effect that Keim was at the shops at half-past 4 that evening. Keim testifies that at 25 minutes to 5 that evening, having quit work about 5 minutes previous thereto, he left the shops in company with Shober, a fellow workman, and took the street car at Ninety-Second street to go home. Shober's testimony agrees with that of Keim, and is to the effect that he was on the car with Keim from 25 minutes to 5 until 10 minutes to 6 that evening, when Shober left the car at Thirty-First street and Cottage Grove avenue, about two miles from the place of the assault. Nathaniel White, a lace merchant and a disinterested witness, testified that Keim arrived home in the neighborhood of a quarter of 6 that evening. Duffy testifies that he was employed at the corner of Halsted and O'Neil streets, about ten blocks from the place of the assault; that he quit work at 4:30 on that day, and immediately took a car, in company with John Morrison, a fellow workman, for home; that they proceeded together on the O'Neil street car until they reached Fifty-Ninth street, where Morrison got off. This was about thirty-two blocks from the scene of the altercation. This point was reached at about 5 or 10 minutes after 5 o'clock. Duffy is cor-



roborated in his statement thus far by the testimony of Morrison. Duffy testifies that he then proceeded on the car to Sixty-Third street, at which point he took a Sixty-Third street car to Stony Island avenue, and then proceeded to his home, which he reached about 5 minutes to 6 o'clock that evening. As to Olson, he was not apprehended and not on trial.

The chief evidence of importance in the record to implicate Keim and Duffy in the assault is the testimony of Hornburg. In direct contradiction of this testimony, both the defendants, and also Hibben, Shober, White and Morrison, testify that Keim and Duffy were not at the place of the assault at the time it must have occurred. The defendants had been friends of Hornburg for many years, and between them had never arisen a word, discussion, or feeling of any character other than that of friendship and good will. While it is true the evidence seems to show there were labor troubles then existing among the boiler makers in Chicago, the record also shows that the defendants and Hornburg, though boiler makers, were not participating therein, and that all were engaged at their trade, without interest or connection with the strike then in progress. It also seems, from the evidence, that, at the time Hornburg was assaulted, Olson, the other defendant, was in the Kingdom of Norway, or at any rate not in the city of Chicago, and hence it was impossible for him to have been one of Hornburg's assailants.

To sustain this conviction, we must do so on the unsupported testimony of the complaining witness, against the equally emphatic testimony of plaintiffs in error, denying that they had anything to do with the assault, or that they were even at or near the place at the time it was committed, and against strong corroborating testimony of several reputable witnesses to the effect that the accused could not have been present at the assault. True, the presiding judge, who heard and saw the witnesses testify, had better opportunities than we have to judge of their credibility; but we cannot, on the record before us, sustain the conviction on that ground. We fear that the frame of mind of the learned judge, who tried the case without a jury, was not as impartial and unbiased as it should have been, and that the defendants may have suffered from that cause. Hornburg had

testified that at the time of the assault he saw a man standing in a drug store on the corner, and counsel for the defendants asked the witness, "Well, is there any other store about there?" The record then shows the following:

*The Court:* Why, what do you ask this question for?

*Mr. Stafford:* Why, just simply to show your honor that there were stores around there, with people in them.

*The Court:* Yes?

*Mr. Stafford:* And his statement that there was nobody in the mix-up there, and excitement and assault—

*The Court:* Yes?

*Mr. Stafford:* That those people— None of them that were there came to his rescue.

*The Court:* Why, I saw that assault made last Saturday upon those people at the corner of Fifth avenue and Washington street; and I stood there,—there were as many people there as there are in this court room,—and there was not a soul that lifted his fingers when those men were knocked down. I saw it. Where is the improbability about it? I saw that. Now, to talk about the improbability of nobody raising a finger is absurd. Go on.

*Mr. Stafford:* It is also improbable that if those people saw it—

*The Court:* Go on. I will put my personal experience in these matters into the scales here.

The personal experience of the judge in another case was not a proper matter to put in the scales against defendants, and there was danger that innocent men might be convicted under the influence of an honest indignation excited by the personal observation of the judge of another assault made upon peaceable men without any justification. Besides, it was proper to prove on behalf of the accused that the place where the assault was committed was a public one, and that there were other persons, few or many, within hearing and seeing distance at the time, as bearing upon the question whether the defendants did in fact commit the assault or not. In support of the motion for a new trial, an affidavit was made by one James E. Dixon that he was at or near the place where the assault was committed, and witnessed it, and that he was acquainted with the defendants

and with Olson, and also with Hornburg, and that the defendants, Keim, Duffy, and Olson, were not the persons who committed the assault.

After a full consideration of the case as disclosed by the record, we have reached the conclusion that the case should be remanded for another trial, in which the guilt or innocence of the plaintiffs in error may be made more clearly manifest.

The judgments of the Appellate and Criminal Courts will be reversed, and the cause remanded to the Criminal Court for another trial. Reversed and remanded.

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PEOPLE V. O'HARE.

124 Mich. 515—83 N. W. Rep. 279.

Decided June 26, 1900.

TRIAL: \* *Prejudicial criticisms of defendant's counsel by presiding judge—Partisan remarks in instructions to jury—Improper evidence.*

1. Severe reflections by the presiding judge, in the presence of the jury, on the defendant's counsel, for failing to have a certain witness subpoenaed, etc., *held* to be reversible error.
2. It is reversible error for a presiding judge to make a partisan argument, while instructing the jury.
3. It is error to admit evidence to prove, that a witness was a street walker and had such reputation among police officers.
4. It was reversible error to prove that an associate of defendant, who was not a witness, had on one occasion, been arrested.

Error to Circuit Court, Bay County; Hon. Andrew C. Maxwell, Judge.

John O'Hare, convicted of burglary, appeals. Reversed.

*John E. Simonson*, for the appellant.

*Edward E. Anneke*, Prosecuting Attorney, and *Lewis P. Coumans*, Assistant Prosecuting Attorney, for the people.

HOOKER, J. The defendant was convicted of burglary, upon a charge of breaking and entering a farmer's barn and stealing

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\*See 11 Am. Crim. Rep. 495 and 504-506.

a double harness. The outline of the case for the prosecution is that the barn door was found open in the morning, and the harness gone. The yard gate was open, and tracks showing that a buggy had stood near by, and afterwards gone south, were distinguishable. The respondent and his companions were shown to have hired a buggy in Bay City that night, about 12 midnight. The harness was found in possession of one Sackles, south of Saginaw, the next morning. He had traded a horse for it, the morning that it was missed, to Burkhardt and Wines, the men who were with defendant in the buggy. The defendant claimed that he had a slight acquaintance with one Martin, and that, a few days before the harness was stolen, he met Martin, who told him that he had a harness to sell. Defendant had no use for the harness, and the subject dropped. On July 9th defendant met Wines, who told him of a man who would trade a horse for a harness, and defendant mentioned his talk with Martin. On July 12th defendant again saw Martin, who agreed to bring the harness to Burkhardt's barber shop for inspection that evening, which he did about 10 o'clock. Defendant paid Martin \$10 for it, \$3 of which he borrowed from Burkhardt, and \$2 from a young woman named Hattie Smith. The horse and buggy were then hired, and used for the purpose of getting and taking the harness to Saginaw County, where it was traded for the horse. Wines was taken because he alone knew where to find the man with whom they were to trade. This horse was afterwards sold to Boutell.

Burkhardt, who had been previously convicted, was sworn, and testified to the facts claimed by the defense. Martin was not called by the defense. During the examination of Burkhardt, the following colloquy occurred:

*The Court:* You have had the services of the sheriff of the county at your disposal. Why haven't you brought this Mr. Martin here?

*Mr. Simonson:* We have endeavored to get Mr. Martin.

*The Court:* Why haven't you taken a subpoena for him?

*Mr. Simonson:* We sent a man yesterday to try to find out where this Mr. Martin was, in order to get a subpoena. We took the—

*The Court:* You haven't sent the sheriff to look for him at all. I have been so advised, and I think there is an order in the case that the witnesses be subpoenaed at the expense of the county.

*Mr. Simonson:* We take an exception to the remarks of the court.

*The Court:* It looks to me like an imposition on the court.

*Mr. Simonson:* We take an exception to the remarks of the court.

*The Court:* Take all the exceptions you are a mind to. Good faith in an attorney must be exacted in every court of justice. I cannot allow you to pick up or look after a straw man here, in order to tempt people to commit perjury.

*Mr. Simonson:* We take an exception to the remarks of the court.

*The Court:* If there was any such man as Mr. Martin, he can be produced or accounted for. You have had the assistance of the whole State of Michigan at your back to do it, without a cent of costs.

*Mr. Simonson:* We take an exception to the remarks of the court.

*The Court:* It seems to me that you are trifling with the court, and occupying its time sillily and foolishly. Not only that, but you are encouraging the commission of a crime. If there is no such man as Martin, then the testimony is all false.

*Mr. Simonson:* We take an exception to the remarks of the court. Shall I go on with the witness?

*The Court:* You can do whatever you are a mind to.

*Q.* You came back after you took Miss Smith home, and you found Mr. Daniels and O'Hare in front of your place?

*A.* Yes.

*Q.* What did you do then, and what conversation did you have?

*A.* Mr. Daniels got up and leaned against a pole, and I sat down, and we were talking, and I says: "I believe Mr. Vanderbilt has an opening at his place, and a dance. I ought to go out, as he comes to my place, but I guess I won't go. It will be too far to walk back."

*The Court:* Where does Martin live?

A. I couldn't tell you. It seems to me that I saw the man once or twice previous to that.

*The Court:* You told us on the other trial that he lived up at Portsmouth.

A. That is what I learned from a man in the jail.

*The Court:* You haven't taken any subpoena for him or sent the sheriff after him?

A. I mentioned it to the sheriff.

Q. You mentioned it to your attorney?

A. Yes; that day when he came in I told Mr. Anneke about it. Mr. Anneke was the first one I mentioned it to.

Q. Why didn't Mr. Simonson send for him?

A. I never spoke to Mr. Simonson.

Q. You knew he was a necessary and material witness?

A. Certainly, we would like to have him.

*The Court:* But you made no effort to get him?

A. I couldn't do anything.

*The Court:* You could ask the sheriff.

A. I did tell the sheriff over there.

*The Court:* Instead of getting a man that you thought, if he existed, and would tell the truth, could help you out of this scrape, you saw fit, both of you, to ransack every crib and bad place there is here to get some witness that would tell a lie. It seems to me that has been the practice, instead of the legitimate practice of the law.

*Mr. Simonson:* We take exception to the remarks of the court.

*The Court:* I don't think a lawyer is fit to practice law that would be guilty of such a practice as that.

*Mr. Simonson:* We take an exception to the remark of the court.

*The Court:* You can have no exception here.

*Mr. Simonson:* Shall I proceed with the witness?

*The Court:* There is an order of the court assigning you to defend this man, which directed the sheriff to subpoena all of his witnesses at the expense of the county.

*Mr. Simonson:* How could I know what Mr. Martin—

*The Court:* You knew the importance of Mr. Martin, and that, of all things in the world, he ought to be produced.

*Mr. Simonson:* As soon as I was appointed I directed a man to go up there, and to go to every Martin family up there, and find out who he was.

*The Court:* Who did you send?

*Mr. Simonson:* John L. Averill.

*The Court:* Why didn't you send the sheriff?

*Mr. Simonson:* How could the sheriff go and subpoena a man until he knew who to subpoena and where he was? Suppose I say, "Go and get Mr. Martin." What would he tell me? He would say, "Who is Mr. Martin, and where does he live?"

*The Court:* I cannot have this class of work done here, and I won't have it.

In his charge the court alluded to the subject as follows:

"Now, under this state of facts, as to that man Martin, I think the defendant was bound to produce him or account for him if he could. You have heard the testimony of the defendant, and of this man Horn, and of this girl, and of his accomplice, Burkhardt. Horn testified that he saw a man come into the Grand Central Hotel and speak to O'Hare, and that finally he went out with him to the corner; looked at the man and the harness. He had a very small horse. Both Burkhardt and O'Hare testify about O'Hare borrowing the money,—that he had five dollars, Burkhardt only had three, and that they borrowed these two dollars of the girl to make up the ten dollars that he wanted. Now, gentlemen, if a thirty-eight dollar harness was offered in the night for sale for ten dollars, a prudent man ought to be on his guard about buying it. He ought to be able to show, if he bought it, that the transaction was honest and free from suspicion. You have heard the testimony of both Burkhardt and the defendant here, and you must be aware of the terrible strain and temptation they are under to controvert this evidence by false testimony, if false testimony will do them any good. As to the relations between this girl and this Burkhardt, she testifies that he was her lover, and they were engaged to be married. A wife has often as much interest for her husband as the husband himself can have. But now I reach a branch of the case which I think I ought to fully submit to you. Last Monday, I think it was, Mr. O'Hare applied to the court to assign him counsel and means to procure his witnesses with.



An order was made assigning Mr. Simonson to aid him. A similar order was made that the sheriff summon, at the expense of Bay County, all the witnesses that he might need in his defense. The sheriff is an officer of the court over which the court has absolute control about the service of papers, and the court can punish him for contempt for any violation or lack of duty. Simply giving the name of a witness to the sheriff was all that was needed in order to secure his attendance here if he could be found. This court does not recognize any constable at all, except as the sheriff may employ him to preserve order in the court room. I cannot take his return as any evidence, as I do that of the sheriff or deputy sheriff. He has no business to perform any service of this court except the solitary duty of attending court when requested by the sheriff. Mr. Averill, a constable, and officer not recognized by the Circuit Court of this county, is sent out by Mr. Simonson to find this man. He starts out at three o'clock and is back that night. He takes a city directory and looks over four or five names, and he goes out to look for Martin. If the story was true that such a man existed, did he or his attorney avail themselves of what the law had placed in their hands in order to get him here? If it is not so, it casts a very black shadow over this defense. You may look at it as part of a scheme to fabricate a defense, to justify it by perjury, and force it through by an immense number of witnesses swearing falsely."

The witness Hattie Smith corroborated Burkhardt. She was interrogated upon cross-examination as to her relations with Burkhardt, and denied any impropriety in them. Afterwards an officer was permitted to testify that she was a street walker, and had such a reputation among the police officers, and that she associated and roomed with another woman, not a witness, of bad repute. Wines was not a witness, yet a witness was permitted to testify that on one occasion he knew of his being arrested.

The course taken by the circuit judge cannot be approved. His strictures upon counsel were excessive, and it was not for him to make a partisan argument upon the failure of the defendant to produce Martin. Again, it was error to admit proof of Hattie Smith's reputation, and of Wines' arrest. The judg-

ment is reversed, and a new trial ordered. The other justices concurred.

NOTE (by J. F. G.).—If judges were reminded of the limits of their duties, and of the province of jurors to pass upon questions of fact, by instructions presented at each criminal trial, these outbursts of officious advice to juries, upon questions of fact, would be less frequent. The writer has used several forms, which have been approved by the trial judges of the Criminal Court of Cook County. One of them, a short form, has been adopted by the State's Attorney's office, as appears by the files, in *People v. Sullivan*, tried at the December Term, 1902, of that court. It is as follows:

In the giving of these instructions, it is the intention of the court, simply to instruct the jury as to the law applicable to the case; but it is not the intention of the court in the least degree to give to the jury any opinion as to whether or not the defendant is guilty of the offense charged in the indictment; or to express opinion as to the weight or sufficiency of the testimony, or as to the credibility of any witness. It is the duty and the province of the jury to pass upon the evidence, which has been introduced in the cause, and to determine, what facts such evidence establishes; and on such questions, the jury is not to depend on the opinions of either court or counsel, if any opinions in any manner appear, either from court or counsel during the progress of the trial. It is for the court to advise the jury as to the law applicable to the case; it is for the counsel to argue the case as to such counsel it may seem proper; but it is for the jury to determine from the evidence what facts have been proven.

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#### WILSON V. TERRITORY.

9 Okl. 331—60 Pac. Rep. 112.

Decided February 7, 1900.

TRIAL: \* *Prejudicial remarks of the presiding judge—Prosecuting Attorney's comment on defendant's failure to testify.*

1. On a trial for murder, remarks made by the judge during the progress of the trial affecting the character and credibility of a witness are an improper invasion or infringement of the province of the jury; and, when it appears that such remarks were prejudicial to the rights of the defendant, they constitute reversible error.
2. Where the counsel on behalf of the Territory in his closing argument to the jury uses the following language: "The defendant claims he committed the act of killing in self-defense. If so, why

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\*See 11 Am. Crim. Rep. 495 and 504-506.

did he not come on the witness stand and make that statement?" held to be prejudicial error, for which a new trial must be granted on motion of the defendant.

3. Such misconduct by the counsel for the prosecution cannot be cured or remedied by the withdrawal of the prejudicial statements from the consideration of the jury by the court, and admonishing them that they must not consider the same.

(Syllabus by the Court.)

Error to District Court, Blaine County; Hon. John C. Tarsney, Judge.

William Wilson, convicted of murder, brings error.

*F. E. Gillett, P. O. Cassidy and Ed. O. Cassidy*, for plaintiff in error.

*J. H. Campbell*, County Attorney, for the Territory.

HAINER, J. The plaintiff in error was indicted by the grand jury of Blaine County on the 28th day of September, 1898, charged with the crime of murder of one Crate Hudspath in said county on the 17th day of July 1898. On the 3d day of October, 1898, the said defendant was placed upon trial; and on the 5th day of October the jury returned a verdict against the defendant, finding him guilty of manslaughter in the second degree. Motion for a new trial was duly made, overruled, and exception reversed by the defendant. On the 6th day of October, 1898, the defendant was sentenced to imprisonment for a period of four years at hard labor in the Territorial Penitentiary at Lansing, Kan. From this judgment the defendant appeals to this court.

The plaintiff in error seeks to reverse the case upon two assignments of error: (1) Remarks made by the trial court in the presence of the jury, during the progress of the trial, which were prejudicial to the rights of the defendant; and (2) misconduct of one of the counsel on behalf of the Territory in the closing argument of the case to the jury.

It appears from the record that one Henry Drennon testified as a witness on behalf of the defendant, Wilson; and on cross-examination by the county attorney the following questions were asked, and answers returned:

*Q.* What is your business?

A. I am a brick mason by trade.

Q. How long have you been in Geary?

A. I was there about two months.

Q. What had you been doing there?

A. Working for Mr. Wagoner.

After Drennon was excused as a witness, Mr. Wagoner, the man referred to in the testimony of Drennon, was called as a witness; and in course of the examination the following questions were propounded by the court, and answers returned by the witness:

Q. *By the Court:* Had this young man Drennon been working for you?

A. Yes, sir.

Q. *By the Court:* What was he doing?

A. He dealt craps for me.

Q. *By the Court:* Is that what you call bricklaying?

A. No, sir; I never said that. He never laid bricks for me.

Q. *By the Court:* He dealt craps for you, did he?

A. Yes, sir.

Q. *By the Court:* How long has that been?

A. It has been quite a while.

Q. *By the Court:* At Geary?

A. Yes, sir.

At the close of the above testimony, Jack Patterson was called as a witness on behalf of the defendant; but before he took the witness stand the trial judge, in the presence of the jury, made the following remarks: "Gentlemen, this may as well be settled here. I cannot let it pass. The witness Drennon has wilfully testified to a falsehood, intending to deceive this jury and this court." Thereupon Mr. Cassidy, counsel for the defendant, stated to the court: "I object to this statement in the presence of the jury, and except to the statement and language used." The court thereupon, in the presence of the jury, further stated: "This witness Drennon, intending to give the court and jury to understand that he was following an honorable occupation, stated under his oath that he was a brick mason by trade, thereby giving weight to his testimony, when in fact he was a gambler by occupation, and violating the law by running a crap table for Wagoner." Thereupon Mr. Cassidy again, as

counsel for the defendant, made the following objections: "I protest against this language of the court, and except to it. I want to have a record made of this proceeding, which is prejudicial to my client."

*By the Court:* This court will not permit itself and its proceedings to be imposed upon in this way.

*By Mr. Cassidy:* May it please the court, I protest and except to the statements of this court, and the violent manner of the court in making them in the presence of the jury.

*By the Court:* If you want a record, sir, I will give you one. Mr. Sheriff, arrest this witness, Drennon, and bring him into court, and hold him in your custody until further order of the court."

And thereupon the witness Drennon was arrested and brought before the court, when further proceedings as to him were suspended until the following morning, when the witness was reprimanded by the court and released from custody.

We have no doubt that these remarks made by the learned trial judge in the presence of the jury were highly prejudicial to the rights of the accused. Under our Code of Criminal Procedure, the jury are the exclusive judges of the weight and credibility to be given to the testimony of a witness. And therefore such remarks made by the trial judge in the course of the trial, in the presence of the jury, affecting the character and credibility of a witness, are an improper invasion or infringement upon the province of the jury, and constitute prejudicial error, which requires a reversal of the cause.

Mr. Thompson, in his excellent treatise on Trials (section 218), says: "Undoubtedly any remarks of the presiding judge, made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford ground for the reversal of the judgment."

In *State v. Lucas*, 33 Pac. Rep. 538, it was decided by the Supreme Court of Oregon that a remark of the court that it does not follow, because a woman is lewd, that her veracity is affected thereby, is improper, as invading the province of the jury, who are the exclusive judges of the credibility of a witness.

In *McMinn v. Whelan*, 27 Cal. 319, a witness on cross-exam-

ination was interrogated in respect to her business and residence. Objection was made to this course of examination. The court overruled the objection, at the same time remarking that the witness was a woman of respectability. The appellant insisted that the remark of the judge was an irregularity of sufficient magnitude to authorize the reversal of the judgment of the court below. Mr. Justice Currey, in delivering the opinion of the court upon this question, said: "From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power, by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may, on the one hand, support the character or testimony of a witness, or, on the other hand, may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with the corresponding detriment to the cause of the other."

In *Garner v. State*, 9 South. Rep. 835, it was held by the Supreme Court of Florida "that remarks made by the judge, in the course of a trial, as to the credibility of witnesses, or the weight of relevant evidence, however inadvertently such remarks may be made, are the subject of exception and assignment as error by the party to whom they seem to be prejudicial, and are ground for reversing a judgment. The policy of our jurisprudence is that the jury shall decide all such questions, entirely liberated from the influence of the impressions of the judge as to them."

In *Roberson v. State*, 24 South. Rep. 474, the Supreme Court of Florida also held that remarks of the judge, during the trial, as to the credibility of a witness, or as to the weight of any evidence relevant to the issue, are an improper assumption of, or infringement upon, the province of the jury, and, when duly excepted to by the party injured, they may be assigned as error, and constitute grounds for reversal.

In *People v. Hare*, 24 N. W. Rep. 843, it was held by the Supreme Court of Michigan that comments by the judge, in the hearing of the jury, on the evidence introduced or about to be introduced, and giving expression of his opinion of the same,

and which may tend to influence their conclusions, or the weight given to such evidence, is error.

In *People v. Hull*, 49 N. W. Rep. 288, it was held by the Supreme Court of Michigan that where the manner of examining a witness by the court was objected to by the defendant, and the court said, "I want all the facts in the case," and defendant claimed that the court's tone and manner were hostile to him, it was error for the court to remark, "If so, it is because the facts may be prejudicial to you if they come out," especially where the court afterwards examines the witness at length.

It is next contended by the plaintiff in error that the court erred in refusing to grant a new trial for the reason that the counsel for the prosecution, in his closing argument, made a statement which was prejudicial to the rights of the accused. It appears from the record that the counsel for the prosecution, in his closing argument to the jury, commented upon the fact that the defendant did not take the witness stand in his own behalf. The language is as follows: "The defendant claims he committed the act of killing in self-defense. If so, why did he not come on the witness stand and make that statement?"

This remark of the counsel for the prosecution was a plain violation of section 5206 of our Criminal Code, which provides as follows: "In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offenses and misdemeanors before any court or committing magistrate in this territory, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him, nor be mentioned on the trial; if commented upon by counsel it shall be ground for a new trial."

We think that this provision of our Criminal Code is mandatory, and leaves no discretion in the trial court to refuse to grant a new trial upon the application of the defendant. Neither do we think that such highly-prejudicial remarks by the prosecuting officer can be cured or remedied by the withdrawal of the statements from the consideration of the jury by the court, and admonishing them that they must not consider the same. *State v. Boyd* (Kan. App.), 48 Pac. Rep. 998;



*State v. Tennison*, 42 Kan. 332, 22 Pac. Rep. 429; *State v. Balch*, 31 Kan. 465, 2 Pac. Rep. 609.

In *State v. Balch*, Mr. Justice Valentine, in delivering the opinion of the court, said: "Nor can the principle be tolerated that convictions for violated law may be procured or brought about by the inauguration and accomplishment of other violations of the law. It is also true that in this case the court below instructed the jury that the statement made by the county attorney should not be allowed to work any prejudice to the rights or interests of the defendant. But, under the authorities, the evil done by such an infringement of the law—an infringement of the law by the prosecuting officer of the State—cannot be remedied or cured by any mere instruction of the court. The only complete remedy, if the defendant is convicted, is to grant a new trial on his motion. Of course, if he does not want the new trial, or does not make a motion therefor, he should be sentenced." The judgment of the District Court is therefore reversed, and the cause remanded, with direction to grant a new trial.

All the justices concurring.

NOTE (by J. F. G.).—It may be that the witness Drennon intended to mislead the court and jury; but it does not appear from the testimony recited in the opinion, that he stated that he worked at his trade for Mr. Wagoner. In answer to one question he said: "I am a brick mason by trade." In answer to the question what he had been doing at Geary he answered: "Working for Mr. Wagoner," but did not say that he was working for Mr. Wagoner at his trade, as the court assumed in his remarks in the presence of the jury. Again, it is worthy of notice, that the court assumed that Mr. Wagoner's testimony was true, and therefore, that Drennon's testimony was false. This was clearly an unwarrantable assumption for the court to force upon the jury. It was for the jury to pass upon the weight of the testimony.

## LEO v. STATE.

63 Neb. 723—89 N. W. Rep. 303.

Decided February 6, 1902.

TRIAL: *Examination of witnesses by the judge—Cross-examination of defendant—Prejudicial error.*

1. While it is the right of a trial judge to interrogate witnesses, when essential to the administration of justice, yet the practice of so doing, except when absolutely necessary, should be discouraged. The common-law rule conferring arbitrary power upon trial judges has been so far modified by the Code as to greatly limit this power, and in case of its abuse a reviewing court would not hesitate to give a new trial to the injured party. *Fager v. State*, 35 N. W. 195, 22 Neb. 332.
2. *Held*, as disclosed by the record, there was an abuse of discretion by the trial court in interrogating different witnesses during the trial of the cause, which was prejudicial to the rights of the defendant.
3. While a police officer was on the witness stand in behalf of the prosecution, the assistant prosecutor, after an objection to a question propounded to the witness, stated: "I want to show that he [the witness] has known him [the accused] a long time, and had him under observation for other jobs;" and also, on the cross-examination of the accused, who testified as a witness in his own behalf, asked him: "Have you ever been arrested before?" "Have you ever been convicted of a crime?" "Isn't it a fact, Mr. Leo, that you have served time in the penitentiary in the State of Nebraska?" "Have you ever been convicted of a crime, and sent to the State penitentiary at Lincoln as a punishment for that crime?" "And you never at any time were convicted of a felony and sent to the State penitentiary of the State of Nebraska, at Lincoln?"—there being no competent evidence of any prior conviction of a felony. *Held*, such action was unwarranted and prejudicial to the defendant's substantial rights, for which a new trial should be granted.

(Syllabus by the Court.)

Error to District Court, Douglas County; Baker, Judge.

James J. Leo, convicted of robbery, brings error. Reversed.

*Jefferis & Howell*, for the plaintiff in error.

*F. N. Prout*, Attorney General, and *Norris Brown*, Deputy Attorney General, for the State.

HOLCOMB, J. A careful perusal of the record of the prosecution of the plaintiff in error (defendant below) leads to the

conclusion that the judgment of conviction ought not to be permitted to stand, and this altogether without regard to the merits of the question of guilt or innocence of the accused. To affirm the judgment does violence to well settled and recognized rules of practice and procedure in criminal prosecutions, and establishes a precedent that would be in violation of our conception of the rights of every individual charged with crime, and safeguards thrown round him in a prosecution for the commission of such crime. The defendant is charged with robbery from the person, by putting in fear and intimidating the person robbed. The offense for which he was prosecuted is commonly called a "hold up;" that is, by threats and the use of deadly weapons money was charged to have been taken from the cash drawer of a saloon in Omaha from and in the presence of the proprietor. Two others, patrons of the saloon, were also in the room at the time of the robbery. The defense interposed was an *alibi*. No person identified the accused, save the prosecuting witness, the proprietor of the saloon, to whom the accused was a stranger prior to the transaction, but who, after the arrest, was identified by the witness as one of three parties engaged in the robbery. The other two witnesses present were unable to identify him as one of the actors. Otherwise the evidence was circumstantial. The accused took the witness stand in his own behalf, denied that he was at the place where the crime occurred, and testified, with others, that he was at a hotel in South Omaha, some three or four miles distant. Strenuous complaint is made because of the manner in which the prosecution at the trial was carried on; it being argued and assigned as error that the trial court abused its discretion in interrogating the different witnesses during the trial of the cause, and that the assistant prosecuting attorney was guilty of irregularities and misconduct prejudicial to the rights of the defendant, and for the purpose of unduly influencing the jury against him, by asking the accused, while a witness in his own behalf, incompetent and prejudicial questions. It is to these two assignments of error that we address ourselves.

In a bill of exceptions containing the evidence, and covering some 140 pages, on over 30 pages it is disclosed that the examination of the different witnesses by counsel for the State and

defendant was interrupted by the trial court for the purpose of permitting the court to interrogate the witness regarding the matter under investigation. At different times the questions thus asked the witnesses by the court were objected to by defendant's counsel, and, it being apparent that the questions were improper, the court sustained the objections on its own questions. Other objections were made by defendant's counsel and overruled. The questions in many instances were entirely proper, and served only the purpose of bringing out the truth, and conducing to a clearer understanding of the testimony of the witness. Their tendency, in the main, was not violative of any of the proprieties which should obtain; were not calculated to prejudice the defendant, or do other than bring about a proper administration of justice. The great number of questions thus asked the different witnesses by the court we regard as in itself immaterial, if the questions were of such character as to make them appear to be essential to the administration of justice, and disclosed no leaning on the part of the presiding judge either in favor of or against the defendant. We see no impropriety in a trial court interrogating witnesses regarding a fact under investigation, when the tendency is only to develop the truth, and is calculated in no wise to influence the jury, save as the testimony will assist them to arrive at a correct conclusion on the questions of fact in issue. Where, however, the questions are of such character as to induce in the minds of the jury a belief that the court is of the opinion the accused is guilty, and the questions are propounded for the purpose of fastening guilt on him, such procedure would be clearly prejudicial to the substantial rights of the defendant, and require a reversal of a judgment of conviction if it should follow. In some few instances in the record before us the questions asked by the court are far more appropriate as coming from a public prosecutor, and had, we are satisfied, an unfavorable influence with the jury against the accused. The discretion resting with the trial court to interrogate witnesses was carried to its full limit and beyond, and its abuse of such discretion was evidently prejudicial to the rights of the defendant, rendering it impossible to say that his guilt has been established fairly, and by a jury uninfluenced by any consideration save the force

of the legitimate evidence in the cause presented to them for their consideration. The subject in hand has been heretofore considered by this court in *Fager v. State*, 22 Neb. 332, 35 N. W. Rep. 195, where it is held: "While it is the right of a trial judge to interrogate witnesses when essential to the administration of justice, yet the practice of so doing, except when absolutely necessary, should be discouraged. The common-law rule conferring arbitrary power upon trial judges has been so far modified by the Code as to greatly limit this power, and in case of its abuse a reviewing court would not hesitate to give a new trial to the injured party." Says Maxwell, C. J., in a concurring opinion: "In my view, our statute has changed the common law so far as to practically prohibit the presiding judge from examining the witnesses in whole or in part in a criminal case." "A trial cannot be fair and impartial if the judge is permitted, either directly or indirectly, to express an opinion upon the facts. His opinion necessarily would have great weight with the jury, and, as he is not permitted directly to give his views upon the facts, he should not be permitted to do so indirectly, either by his conduct, or the form of questions to witnesses. It may be said that in some cases it would be impossible to convict a party unless the judge should bring his influence to bear upon the jury. Such an argument, instead of being in favor of the practice, is directly opposed to it. Ordinarily, if the facts will justify the jury in finding a verdict of guilty, the probabilities are that they will do so. If the testimony leaves the guilt of the accused in doubt, he is entitled to the benefit of that doubt, and no influence outside of the testimony should be brought to bear upon the jury to induce them to overcome such doubt. Otherwise the accused will be deprived of a constitutional guaranty—a fair trial—and perhaps be unjustly convicted." While the opinion expressed by the then chief justice is perhaps stronger than is warranted by any sound principle of law or rule of practice, or necessary for the proper administration of justice, yet it but emphasizes the wisdom and necessity of an abundance of caution on the part of every trial judge to refrain from any participation in the trial of a criminal case which could be construed as an expression of opinion by the court, and thereby unduly and unfavorably in-

fluencing a jury as triors of the facts involved in the controversy.

The conduct of the assistant prosecuting attorney in the trial of the case does not appear to be in conformity with law. The result of the acts complained of was prejudicial to the defendant, and denied him the fair and unbiased consideration of the legitimate evidence by the jury to which he was entitled. The prosecution appears to have been conducted on the theory that the accused was a hard character, which fact should be considered by the jury in determining his guilt of the crime charged. A police officer was on the witness stand, and was asked by the prosecution how long he had known the accused. The question was objected to. It was then stated by the prosecutor: "I want to show that he [the witness] has known him [the accused] a long time, and had him under observation for other jobs." Objections and exceptions were taken to the statement, and the jury advised by the court to disregard the remarks by the prosecuting attorney as to what he wanted to prove. While a reasonable effort was made by the court to cure the error, we are not sure its evil effect was entirely neutralized. The poisoned shaft had sped its way, and it is difficult to conceive how the jury could thereafter have been oblivious of or ignored the fact that the accused was a suspicious character, and under police surveillance, because believed to be engaged in the perpetration of "other jobs," or, in other words, in the commission of different crimes which are constantly occurring in metropolitan cities where the vicious and criminally inclined are wont to congregate. The statement, without reproof from the court, was highly prejudicial, and most damaging to the character of the defendant, and its insidious influences were set in motion in a way wholly unauthorized. A mere statement to disregard the remark probably fell short of effecting the desired object. The statement of what the State wanted to show was, in effect, an offer to prove the fact stated, with the means of doing so in the person of the police officer then on the witness stand, and in the presence of the jury. Can there be any serious doubt in the mind of any that, with the scene before the jury as then enacted, the statement carried conviction as to the truth of the fact offered to be proven? And probably it was true, but whether

true or not it could have no legitimate bearing on the question of the guilt of the defendant of the offense then being investigated. It rationally follows that for the remainder of the trial the minds of the jury were poisoned regarding the defendant. There was ever before them and held up to their view the suggestion that the accused was a police suspect, guilty of various crimes, and for that reason it was more probable that he was guilty of the one charged. In *Krum v. State*, 19 Neb. 728, 28 N. W. Rep. 278, regarding a like question, it is pertinently observed by Maxwell, C. J.: "In *St. Louis v. State*, 8 Neb. 411, 412, 1 N. W. Rep. 371, where an improper question was asked and excluded, this court refused to reverse the case for that cause alone. A different rule, however, may obtain where there is an offer of evidence which is clearly incompetent, as that the defendant has committed a crime other than that with which he is charged. The effect of such an offer cannot fail to be prejudicial to the accused on the minds of the jury, and nothing that the court can say will entirely obliterate the effect. Cases are to be tried upon the evidence, and the guilt of the accused determined from that alone, and no prosecuting officer should be permitted to supply its place with prejudice." *Leahy v. State*, 31 Neb. 561, 48 N. W. Rep. 390, was a prosecution where the accused was a witness in his own behalf, and was asked on cross-examination if he had not been guilty of attempting to commit a similar crime soon after the time of the one he was being tried for; the prosecuting officer, when objection was made, stating that it was intended to follow the matter up, and show that such was the case. The witness had been summoned by whom it was expected to prove such fact, and in explanation it was said on behalf of the State that, in the opinion of the prosecutor, he had the right to show such fact. It was held that the conduct of the prosecutor was unwarranted and prejudicial to the accused. In a civil case (*Railroad Co. v. Kellogg*, 55 Neb. 748, 76 N. W. Rep. 462), after discussing the subject as affecting the trial of civil cases, it is said by the present Chief Justice: "We do not, however, wish to be understood as holding that a rebuke from the court, or even a complete retraction by the offending counsel, is in all cases of this kind a sovereign remedy. If the transgression be flagrant—if the offensive re-



mark has stricken deep, and is of such a character that neither rebuke nor retraction can entirely destroy its sinister influence—a new trial should be promptly awarded, regardless of the want of an objection and exception”—citing *Iron Co. v. Field* (Ala.), 16 South. Rep. 538; *Bullard v. Railroad Co.*, 64 N. H. 27, 5 Atl. Rep. 838, 10 Am. St. Rep. 367; *Paper Co. v. Banks*, 15 Neb. 20, 16 N. W. Rep. 833, 48 Am. Rep. 334; *Live Stock Co. v. May*, 51 Neb. 474, 71 N. W. Rep. 67; *Tucker v. Henniker*, 41 N. H. 317; *Martin v. State*, 63 Miss. 505, 56 Am. Rep. 813; *Rudolph v. Landwerlen*, 98 Ind. 34.

Were the statement we have been considering the only act in the nature of misconduct on the part of the assistant prosecutor, regarding which merited criticism can be urged, we would hesitate before holding the act so prejudicially erroneous, in view of the court's direction to the jury to disregard it, as to, on that ground alone, call for a reversal of the judgment. This statement made while a police officer was on the stand as a witness on behalf of the State appears to be but the beginning of an effort, probably unintentional, to unduly influence the jury in an unauthorized way. In the cross-examination of the accused while a witness for himself, several questions were asked, of a series for the most part improper and incompetent, and well calculated to lead the jury astray, and to deny to the accused the same treatment as a witness as that accorded to all other witnesses. In several questions propounded in cross-examination the accused was asked: "Have you ever been arrested before?" "Have you ever been convicted of a crime?" "Isn't it a fact, Mr. Leo, that you have served time in the penitentiary in the State of Nebraska?" "Have you ever been convicted of a crime, and sent to the State penitentiary at Lincoln as a punishment for that crime?" "And you never at any time were convicted of a felony, and sent to the State penitentiary of the State of Nebraska, at Lincoln?" Some of the questions were answered in the negative, and some, on the objections of defendant's counsel, were unanswered. It does not appear, nor have we any reason to believe, that the defendant had ever before been convicted of a felony, or that the questions were asked under the provisions of section 338 of the Code, providing that a witness may be interrogated as to his previous conviction of

a felony, for the purpose of affecting the credibility of such witness. We are warranted in assuming this, because the prosecution offered no competent evidence of that fact. The records showing such conviction must have been accessible to the State, and, when not produced, we can only infer that no such record was in existence; and, if that be true, then an unfair advantage was taken of the accused by an effort, ostensibly for the purpose of laying the foundation for the introduction of the record of conviction, to ask many incompetent, improper, and prejudicial questions, which could have no other object than to unduly influence the jury to defendant's prejudice. The section referred to provides: "A witness may be interrogated as to his previous conviction of a felony. But no other proof of such conviction is competent except the record thereof." The scope and effect of this section is to allow the witness to be interrogated as to whether he has before been convicted of a felony, calling his attention thereto, so that he may make admission thereof, or the introduction of the record of such conviction in evidence. *Association v. Rawlings*, 60 Neb. 379, 83 N. W. Rep. 175. It is not contemplated by the statute that an accused, when a witness in his own behalf, should be treated differently from other witnesses, or that the statute should be used as a cover to ask incompetent or improper questions, calculated to prejudice the accused before the jury by whom he is being tried. The questions, in the way in which they were put to the defendant, can hardly be regarded as for any other purpose than to engender in the mind of a jury the belief that the accused was addicted to criminal acts, and had been guilty of other independent and distinct offenses than the one for which he was being tried. This could serve no lawful purpose in establishing his guilt of the crime charged, and must, we think, be regarded so unwarranted as to amount to prejudicial error. In *Elliott v. State*, 34 Neb. 48, 51 N. W. Rep. 315, it is said: "Such cross-examination is highly improper, and cannot fail to be prejudicial. A prosecuting officer, in his zeal to enforce the law, must not forget that he also occupies a semijudicial position, and that his duty requires him to resort to no questionable or improper means to secure a conviction. . . . The questions quoted, and others of like kind, must have been preju-

dicial to the accused. Where a defendant in a criminal case offers himself as a witness on his own behalf, he is subject to the same rules of cross-examination as other witnesses, and it is the duty of the court to keep the cross-examination within the law." And in *Marion v. State*, 16 Neb. 350, 20 N. W. Rep. 290, it is held: "When, in a prosecution for murder, the defendant on his trial becomes a witness in his own behalf, it is incompetent, on cross-examination, for the purpose of affecting his credibility as a witness, to ask him if he had not pleaded guilty to a penitentiary offense in another State; the entering of a plea of guilty without judgment or sentence not being a conviction, within the meaning of section 338 of the Civil Code of Nebraska." In the opinion is found a discussion of the meaning of the words "conviction of a felony." Says the Supreme Court of California: "Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust." *People v. Lee Chuck*, 78 Cal. 329, 20 Pac. Rep. 723. In *People v. Wells* (Cal.) 34 Pac. Rep. 1078, the subject is exhaustively discussed, and many authorities cited and quoted from, establishing the rule that, when an unfair advantage is gained over an accused by improper methods of practice while conducting the prosecution, it will be deemed prejudicial, and a new trial granted. At the close of the opinion it is said: "Therefore the credibility of appellant was a most important matter in the case, and whatever tended to impair that credibility was material in the highest degree; and that the conduct of the prosecuting attorney so tended is entirely clear. It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all, and to hold otherwise would be to provide ways and means for the conviction of the innocent." See, also, *People v. Cahoon* (Mich.) 50 N. W. Rep. 384.

The series of questions asked the accused in the case at bar,

and statements made by the assistant prosecutor, to which we have adverted, were a departure from legal methods which should obtain in the prosecution of those charged with the commission of felonies, and prejudicial to his rights, preventing a fair and impartial trial, such as he is lawfully entitled to; and because of which, and for the reasons first stated, the judgment must be reversed, and the cause remanded for further proceedings.

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STATE V. TAYLOR.

7 Idaho, 134—61 Pac. Rep. 238.

Decided May 19, 1900.

*TRIAL: Prejudicial remarks by presiding judge.*

1. Where, on the trial of a defendant upon a charge of murder, a witness testified that after the shooting, and when the defendant was some distance from the house where the shooting took place, "he [the defendant] took a shot at me [the witness]," in overruling an objection to the evidence the court remarked that "the object of the admission of that testimony is to show the character, disposition, and action of the defendant at that time, as being evilly disposed towards some one." *Held*, that both the admission of the testimony and the remarks of the court were error.
2. The coroner, being upon the witness stand, was asked by the prosecution if he held an inquest over the deceased; and, the question being objected to by defendant, the court remarked, in sustaining the objection: "I sustain that. There was nothing mysterious about it. People knew who shot him. A coroner's inquest is only to find out how a person comes to his death. If shown otherwise, they do not hold one." *Held*, reversible error.

(Syllabus by the Court.)

Appeal from District Court, Shoshone County; Hon. A. E. Mayhew, Judge.

Walter Taylor, convicted of manslaughter, appeals. Reversed.

W. W. Woods, for the appellant.

S. H. Hays, Attorney General, for the State.

HUSTON, C. J. The defendant was convicted of manslaughter, and appeals from the judgment of conviction, and also from the order of the court denying the motion for a new trial.

Briefly stated, the facts in the case, as they appear from the record, are about as follows: The defendant, one Barnhart, and one Mabel Meade, were engaged in some dispute or altercation upon the porch of the house occupied by the said Mabel Meade as a house of prostitution, in the town of Wardner. While this altercation was going on, the deceased came out of the house, onto the porch, and engaged in the controversy. Almost immediately upon the appearance of deceased, he and Barnhart engaged in what is termed by the witness a "scuffle." They clinched, and in their scuffle they passed from the porch into the hall of the house, and from the hall into the front room or parlor; and as they passed into the front room or parlor a shot was fired, and the deceased fell, expiring almost instantly. When deceased and Barnhart passed from the hall into the front room, they were clinched. The woman Mabel Meade testifies that when the shot was fired she had hold of Barnhart's arm, and that he and deceased were clinched. She did not see the defendant after the scuffle commenced between Barnhart and deceased, "until she saw him going down the alley after the shooting." The only other person in the room at the time of the shooting was the woman Susie Wilson, who testifies that she did not see the defendant at all, and that, had he been in the room, she must have seen him. The physician who examined the body of the deceased immediately or very soon after the shooting testifies as follows: "I could determine the point of entrance, on account of a powder stain or powder mark covering an area of, perhaps, two inches in diameter. The hair was singed right down to the scalp, showing that the gun was in close proximity to the body when the shot was fired. Q. Describe to the jury, in your opinion, how far the gun was from the head of Leroy. A. When he was shot, approximately, I should say anywhere from two to six feet." No witness testified to seeing the defendant inside the house when the shooting took place. The witness Mabel Meade was permitted, over the objection of defendant, to testify that after the shooting, and while defendant was going from the house down an alley, he "took a shot at her." Defendant's counsel moved to strike out this testimony, which motion was denied by the court; the court saying, "The object of the admission of that testimony is to

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show the character, disposition, and action of the defendant at the time, as to being evilly disposed toward some one. That is the proposition." To all of which defendant excepted.

We think the admission of this testimony was error. It was not admissible as a part of the *res gestæ*, and the reason given by the court for its admission is still more erroneous. In the trial of a criminal case, and more especially one in which the life of the defendant is involved, the trial court cannot be too careful in refraining from any act or expression which can possibly tend to prejudice the case of the defendant with the jury. 2 Thomp. Trials, § 2297; *People v. Buster*, 53 Cal. 612; *People v. Williams*, 17 Cal. 142.

On the trial, one Hugh France, the coroner, and the physician first called to see defendant after the shooting, testified as follows:

Q. Did you hold any coroner's jury over the death of Ed. Leroy?

A. I did not.

Q. State to the jury why you did not.

Mr. Evens (counsel for defendant): We object as immaterial, irrelevant, no part of the *res gestæ*.

The Court: I sustain that. There was nothing mysterious about it. People knew who shot him. A coroner's inquest is only to find out how a person came to his death. If known otherwise, they do not have to hold one.

To the above remarks of the court, defendant excepted.

There can be no question but that the remarks of the court were not only improper, but were manifestly prejudicial to the defendant, and constitute reversible error. We cannot agree with the attorney general in his contention that this is not a proper matter to be brought here by bill of exceptions. It was error,—prejudicial error,—and was duly excepted to, and properly embodied in the bill of exceptions. The court had an opportunity to direct the jury not to regard it, but did not do so; and, even if he had, the error would not have been cured thereby.

The witness France also testified that while defendant was under arrest, and shortly after the shooting, he (witness) heard defendant say that "he [defendant] fired the shot that killed

Leroy [the deceased].” This is the only direct testimony connecting the defendant with the shooting. The only witnesses present in the room at the time the shot was fired, and who testified on the trial, to wit, Mabel Meade and Susie Wilson, state that the defendant was not in the room when the shot was fired. Inasmuch as the cause must be sent back for a new trial, we do not deem it necessary to consider the question of the insufficiency of the evidence to support the verdict.

We have carefully examined the instructions given and refused, and we cannot say that any substantial error appears therein. While some of the instructions asked by the defendant, and refused by the court, state the law correctly, we think the subject-matter of them was contained in the instructions given by the court. The judgment of the District Court is reversed, and a new trial ordered.

SULLIVAN, J., concurs. QUARLES, J., was absent at the hearing of this case, on account of sickness.

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### PERRY v. STATE.

116 Ga. 850—43 S. E. Rep. 253.

Decided January 9, 1903.

**TRIAL:** *Remarks of the trial judge in presence of jury—Suspending hearing, to receive presentment of grand jury.*

1. It is not error to refuse to grant a mistrial on account of remarks made by the judge in the presence of the jury, when such remarks are not applicable to the case, and cannot, in any view, injuriously affect the rights of the accused.
2. The suspension of the trial of a criminal case to receive the presentments of the grand jury is not cause for a mistrial when it is not shown how the rights of the accused could have been affected. This is especially true where no objection was made at the time. (Syllabus by the Court.)

Error to Superior Court, Whitfield County; Hon. A. W. Fite, Judge.

John Perry, convicted of murder, brings error. Affirmed.



George G. Glenn and Jesse A. Glenn, for the plaintiff in error.

F. E. Shumate, Samuel P. Maddox, Solicitor General, and John C. Hart, Attorney General, for the State.

SIMMONS, C. J. This case presents but two questions, both arising from special grounds of the motion for new trial. Perry, the plaintiff in error, was convicted of murder, and excepted to the refusal of the trial judge to grant a new trial. The evidence clearly authorized the verdict. Indeed, counsel did not contend that this was not so, but relied upon the special grounds just referred to.

1. The first of these grounds is a complaint that the court erred in refusing to grant a mistrial. At the conclusion of the evidence the jurors were, at their request, allowed to retire. During their absence a young man was allowed to enter a plea of guilty to a charge of carrying concealed weapons. Before passing sentence upon him, the court said: "Some one has said that none but cowards, bullies, and foolish boys carry concealed weapons. I don't know how this is, but I think your father-in-law ought to have whipped you for pointing the pistol at him. You are old enough to know better, and I hope you have learned something by experience, and will not come before me again on any charge. The case against you for pointing the pistol will be *non pros'd.*" In the meantime the jurors had returned to the courtroom, and were in a position to hear these remarks of the court. Counsel for Perry excepted to this language of the court, and asked for a mistrial on account of it. The court overruled the motion. The remarks of the court could have had no effect upon Perry's case. Perry, it is true, had shot a man with a pistol, but it did not appear that this pistol had ever been concealed by him. The remarks were not applicable to his case. Even if the jury had not been upright and intelligent men, we cannot see how they could have applied the court's remarks to the case before them, or have acted upon such remarks to Perry's prejudice.

2. The other special ground of the motion for new trial is that during the progress of the trial, and after the conclusion of the evidence and the argument, the court suspended the trial,

sent the jurors to their room, and received the presentments of the grand jury of the county. This is assigned as error, "for the reason that the court had no lawful right to so suspend the trial for said purpose, or for any other purpose." It appears that this was done without the consent of the accused, but it does not appear that he objected, or asked for a mistrial on account of it. Further than this, we think the regulation of the court's procedure and order of business are matters largely in the discretion of the judge. His discretion must to a considerable extent control the administration of affairs in his court, and certainly it does not appear to have been abused in the present case. Nor does it appear that Perry's rights were at all prejudiced. The jurors were out of the courtroom while the presentments were received, and Perry's rights were not affected.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness.

NOTE.—This case came again before the Supreme Court on "extraordinary motion" for a new trial, overruled by the Superior Court, the ruling was affirmed June 26, 1903 (117 Ga. 719, 45 S. E. Rep. 77). The syllabus by the court being in part as follows:

2. The trial judge occupies the position of a trier when passing upon a ground of a motion for a new trial in a criminal case based upon an alleged expression of opinion of one of the jurors, previously to the trial, as to the guilt of the accused. His finding that the juror was competent will not be reversed unless it is apparent that he has abused the discretion which the law vests in him in such cases.

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JAQUES et al. v. STATE.

111 Ga. 832—36 S. E. Rep. 104.

Decided May 11, 1900.

TRIAL: *Insinuating questions by court to witness—Hearsay evidence—Instructions.*

1. When persons on trial for crime put their characters in issue, and introduced a witness who testified that the same were good, it was error for the presiding judge to ask the witness if he had ever known the accused "to do any honest work," and to press upon him other inquiries, the nature of which manifestly indicated

- that the judge did not believe the accused were persons of good character. In thus acting, the judge violated the provisions of section 1032, of the Penal Code.
2. In addition to the error above indicated, the court on the trial of the present case erred further in admitting hearsay testimony, and in giving a charge to the effect that the testimony in behalf of the State, if true, made a case of robbery by intimidation; this charge being unwarranted for the reason that, if the crime of robbery was committed at all, it was, under the evidence, necessarily robbery by force.
  3. There is no merit in any of the special grounds of the motion for a new trial not dealt with above, nor do they, singly or collectively, present any question of special importance.  
(Syllabus by the Court.)

Error to Superior Court, Bibb County; Hon. W. H. Felton, Jr., Judge.

Will Jaques and others, convicted of crime, bring error. Reversed.

*M. Felton Hatcher* and *Jere M. Moore*, for the plaintiffs in error.

*Robt. Hodges*, Solicitor General, for the State.

PER CURIAM. Judgment reversed.

FISH, J., absent on account of sickness.

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#### KIRBY V. STATE.

78 Miss. 175—84 Am. St. Rep. 622—28 So. Rep. 846.

Decided November 12, 1900.

TRIAL: *Presiding judge formerly the district attorney, who drew the indictment.*

The mere fact that presiding judge was previously a district attorney, and in that capacity drew the indictment, did not disqualify him from presiding at the trial.

Appeal from Circuit Court, Warren County; Hon. Patrick Henry, Judge.

Will Kirby was convicted of murder, and sentenced to death, appeals. Affirmed.

The presiding judge was formerly district attorney; and in

that capacity drew the indictment. This was assigned as ground for new trial, in the court below.

*Ricks & Field*, for the appellant.

*Monroe McClurg*, Attorney General, for the State.

CALHOUN, J. This case is presented for appellant with marked ability by counsel appointed by the court, who deserves all credit for his unremunerated services and laborious and intelligent research, on account of which we regret we cannot concur with him. The accused had every possible point made for him in the court below and here. Code, section 919, prohibits a judge to preside where he is of kin to any party to the cause, or interested in it, or "wherein he may have been of counsel." Does the word "counsel" include a district attorney who has had no further interest in the case than simply to draw the statutory indictment? This is the only question in this record worthy of consideration or insisted on. A district attorney need not be, and ought never to be, in the grand-jury room, unless invited to be there by the grand jury for information "in a case in order that the same may be presented in the manner required by law." Code, section 1556. He need not draw or even sign an indictment. *Keithler v. State*, 10 Smedes & M. 192. If it is duly presented in open court, and marked "Filed" by the clerk, it is enough. We have no such statute as that of Texas, the decision under which is relied on by appellant. With us the district attorney "appears and prosecutes for the State" when there is arrest made, and proceedings commenced under the indictment. Because one may be the general counsel for the State or a private person cannot disqualify him from presiding in a case in which he was not actually of counsel, did not advise, and was ignorant of the facts, as we must presume in the case at bar. If it had been shown that the judge, as district attorney, had heard the facts, and advised and drawn the bill, a very different case would be before us.

The record shows a deliberate murder for robbery, and no error is found in it, after the most careful examination. Execution of the sentence is set for Saturday, January 5, 1901, between 11 o'clock a. m. and 4 o'clock p. m., in the manner and at the place as prescribed by law. Affirmed.

## STATE V. WILCOX.

131 N. C. 707—42 S. E. Rep. 936.

Decided September 30, 1902.

**TRIAL:** *Right of accused to fair trial—Demonstrations in and out of court room—Excuse for delaying motion for new trial.*

1. One accused of crime is entitled to a fair trial, including the right to be heard by counsel.
2. During the argument to the jury by one of the counsel for the accused, about one hundred persons, being about one-fourth of the audience, as if by concerted action arose and left the court room, which was soon followed by a fire alarm in the street near the court house; these demonstrations being made for the purpose of interrupting and lessening the effect of counsel's argument. The verdict was guilty. *Held*, ground for new trial.
3. The fact that the accused was in danger of violent death from a mob was a valid excuse for delay in entering motion for new trial.

Appeal from Superior Court of Pasquotank County; Hon. George A. Jones, Judge.

James Wilcox, convicted of murder, appeals. *Reversed*.

*E. F. Aydlott* and *W. M. Bond*, for the appellant.

*George W. Ward* and *Robert D. Gilmer*, Attorney General, for the State.

MONTGOMERY, J. "No person ought to be taken or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property but by the law of the land." And that provision of our State Constitution applies as well as the procedure and manner of trial in our courts of justice as it does to the great principles of law which underlie our society. Under the law of the land, all persons charged with crime are as much entitled to a fair and unprejudiced trial as they are to the protection of their persons, their property, or their reputation. They have the right, under the same constitution, to have counsel for their defense; and any willful interruption of such counsel while conducting such defense, intended to disconcert and embarrass, is not only unlawful as obstructing and preventing a fair trial, but is deserving of the condemnation of all good citizens. In this case the prisoner was arraigned on an indictment for murder, and was con-

victed of that crime in the first degree. The evidence was entirely circumstantial, and, while that character of evidence may, in its very nature, produce a high degree of moral certainty in its application, yet it is never to be forgotten that it requires the greatest degree of caution and vigilance in its application. In reading the record in this case, it hardly seems possible that the jury could have given that cautious and vigilant attention to the evidence which the law required of them, or to the presentation of the prisoner's case to them by his counsel that thought which the importance of the case demanded. In their immediate presence 100 people, in their deliberate purpose to prejudice the rights of the prisoner, committed a great wrong against the commonwealth, and a contempt of the court. On the outside of the courthouse greater improprieties took place for the purpose of prejudicing the prisoner with the jury. No such demonstrations were ever witnessed in our State before, and, for the honor of the commonwealth, such ought never to be repeated. In the statement of the case by his honor he said: "After the evidence was all in, and while one of the counsel was making the closing argument for the prisoner, about one hundred people, being about a fourth of those present in the court room, as if by concert, left the room. Soon thereafter, while the same counsel was addressing the jury, a fire alarm was given near the courthouse, which caused a number of other persons to leave the courtroom. The court is of opinion, and so finds the fact, that these demonstrations were made for the purpose of breaking the force of the counsel's argument. But the court does not find that the jury were influenced thereby. There is no motion made by the prisoner to set aside the verdict in consequence of said conduct." Sufficient excuse was made here by the counsel for the prisoner for the failure to make the motion for a new trial in the court below to justify the attorney general in consenting to an agreement to consider the motion as having been entered at the proper time, which he did. In such a case as this it was not indispensable that a finding by his honor that the jury had been influenced by the conduct of the offenders should have been made. The disorderly proceedings assumed such proportions as to warrant this court in declaring that the trial was not conducted according to the law of the land.

The propriety of our ruling is strengthened by the circumstances that contempt proceedings were not commenced against those offending, and that no motion was made to set the verdict aside and for a new trial after such unheard of demonstrations. The counsel for the prisoner, in his argument here, in response to a question stated that, if the verdict had been set aside, the prisoner would have met a violent death on the instant. The prisoner must not only be tried according to the forms of law, these forms being included in the expression "the law of the land," but his trial must be unattended by such influences and such demonstrations of lawlessness and intimidation as were present on the former occasion. The courts must stand for civilization, for the proper administration of the law in orderly proceedings. There must be a new trial of this case.

New trial.

CLARK, J. (concurring). The judge having found as a fact that the demonstrations within and without the courtroom were made "for the purpose of breaking the force of the counsel's argument," the magnitude and nature of those demonstrations were such as to require a new trial. The administration of justice must not only be fair and unbiased, but it must be above any just suspicion of any influence, save that credit which the jury shall give to the evidence before them. It is of vital importance to the public welfare that the decisions of courts of justice shall command respect, but this will be impossible if there is ground to believe that extraneous influence of any kind whatever has been brought to bear.

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COLLIER V. STATE.

115 Ga. 803—42 S. E. Rep. 226.

Decided July 17, 1902.

TRIAL: *Sensational conduct of witness—Attempted violence toward the defendant—Tumult in court room—Loud threats within the hearing of a deliberating jury—Affdavits of jurors.*

1. The plaintiff in error did not have a fair and impartial trial in the manner contemplated by law, which is guarantied to him by the Constitution of this State; and, whether the verdict was or was



not supported by the evidence, it must for this reason be set aside. The trial judge erred in overruling the motion for a new trial.

(Syllabus by the Court.)

2. Intensely sensational remarks from the prosecuting witness while testifying, accompanied by an effort on the part of her husband to assault the defendant, and an uproar in the audience, followed by loud threats made within the hearing of the jury while deliberating, are sufficient grounds for a new trial; notwithstanding affidavits of jurors stating that such conduct did not influence them in arriving at their verdict. The human mind is so constituted, that it is difficult to determine what does or does not operate upon it, or influence it. (J. F. G.)

Error from the Superior Court of Whitfield County; Hon. A. W. Fite, Judge.

Bill Collier, being convicted of rape, brings error. Reversed.

W. C. Martin and W. M. Jones, for the plaintiff in error.

Samuel P. Maddox, Solicitor General, and Boykin Wright, Attorney General, for the State.

LITTLE, J. Collier, the plaintiff in error, was indicted, at a special term of Whitfield Superior Court, for the offense of rape, and was tried and convicted at the same term. He made a motion for a new trial, which was overruled, and he excepted.

This motion contains a number of grounds. These, it is not necessary that we should consider and pass on *seriatim*, for the reason that we have arrived at the conclusion that, for the reasons hereafter given, the accused did not have a fair and impartial trial as guaranteed to him by the constitution and laws of this State, and that, without regard to the evidence which was produced on the trial, the verdict must be set aside, and a new trial granted. We therefore confine ourselves to a consideration of those grounds of the motion which present the reasons why the trial which resulted in his conviction cannot be sanctioned by the law. These are two. One of them specifies that during the trial, and while the person said to have been assaulted was testifying in rebuttal to the evidence introduced by the defendant, she became very much excited, and began upbraiding the defendant, and the husband of the witness took hold of a chair in a threatening manner as if to strike the defendant with it, but was seized by an officer, and forced to take his seat. At this point the crowd in the courthouse became very

much excited,—got upon the seats,—looking and moving towards where the defendant was sitting. They were commanded by the trial judge to be seated, and this command was, after a little while, obeyed. Subsequently, counsel for the accused moved the court to declare a mistrial on account of this demonstration, and error is assigned on the judge's refusal so to do. Another ground of the motion states, as a reason why a new trial should be granted, that, while the jury was in its room considering the case, a large number of men collected in the courtroom and courthouse yard, swearing, and using threatening language towards the jury, such as: "If the jury does not hang him, we will;" and "We will give the jury until ten o'clock to convict him; and if they don't, we will take him out and hang him."

The first of these grounds was allowed, and approved by the presiding judge. As to the last, the judge stated that he knew nothing of the facts therein stated, but at the hearing of the motion a number of affidavits, on the part of both the State and the accused, were introduced, and read in evidence. Some of these referred to the demonstration which occurred in the courtroom during the trial, and others to the demonstrations which occurred in the courthouse building and in the yard of the courthouse during the time the jury had the case under consideration. It is not necessary that the contents of all these affidavits should be set forth. As to the demonstration which occurred in the courtroom during the trial (as to the meaning of which the affiants differ), and as explanatory of its nature, we have selected, and here present, the substance of two,—one made by Mr. McCamy, of counsel for the defendant, the other by Mr. Maddox, the solicitor general, who had charge of the case for the State. In the affidavit of the former the following statement is made: "Deponent was present in court when the lady alleged to have been outraged was put upon the stand in rebuttal of the testimony introduced by the defendant. During the time she was thus on the stand, she grew very much excited, denouncing the defendant very fiercely, turning to him, saying, 'You know you are guilty.' At this time a large portion of the audience, perhaps 200 in number, became very much excited, and, as it seemed to deponent, all, or nearly so, came pour-

ing over the benches in a very excited manner, and, it seemed to the deponent, to where the defendant was, and seemed their intention was to then and there lynch the defendant. The judge commanded the crowd to sit down, and rose to his feet and commanded the sheriff to keep order. But if the crowd was reprimanded for their conduct, deponent does not remember. And if the judge said anything to the jury about the demonstration at the time, or any other time, deponent did not hear it." The solicitor general gives his understanding of the matter in the following language: "During the progress of the trial, the husband of Mrs. Georgia McPherson, who is alleged to have been raped, was sitting very near deponent. When Mrs. McPherson became excited, and was denouncing the defendant, using the language which appears in the brief of evidence and in the motion for a new trial, the crowd in the courthouse did not make any demonstration while she was testifying, and until she ceased to testify; and when her husband caught hold of a chair, and was seized by the officer, and made to take his seat, was when the crowd arose, got upon the benches, and made the demonstration complained of. In the opinion of deponent, the demonstration was not against the defendant, and would not have been made but for the conduct of the husband of the State's witness, and it is the opinion of deponent that it was curiosity on the part of the crowd to see what was going on between the officer and the witness, and not a demonstration towards the defendant. When the judge arose, and commanded the crowd two or three times to take their seats, they immediately did so, and as soon as the officers succeeded in seating the husband of the witness. It is the opinion of deponent that if the husband of witness had remained in his seat, and had not made the demonstration towards defendant that he did, and if the officer had not taken hold of him, that there would have been no demonstration from the crowd." Each of the statements of the two gentlemen named is, of course, to be accepted as giving the facts as each respectively understood them; and, so treating them, it is obliged to be conceded that a demonstration on the part of a very large body, for some reason, occurred in the courtroom during the progress of the trial, and that this demonstration was made at a time when the husband of the witness was

seeking to do violence to the person of the accused, in the presence of the court and jury. These gentlemen and other affiliates differ in opinion as to what the demonstration meant. In referring to that ground of the motion which was based upon the conduct of the crowd in the courtroom, and in the courthouse yard after the trial of the case had been completed, and after the jury had retired to their room in the courthouse building, quite a number of affidavits, including those of the jurors who tried the case, were submitted. We refer to such of them as we deem necessary to illustrate the rulings which we make. The bailiff, in whose charge the jury had been placed, testified that he carried the jury to the jury room, and locked them up; that he remained at the door of the jury room during their deliberations; that no one had access to the jury, nor the jury to any one; that around the courthouse yard there were some noisy demonstrations, and some talking in the courthouse, but he does not believe that the jury could have heard and distinguished what was said; that, in the opinion of this witness, the crowd remained at the courthouse as a matter of curiosity, awaiting the verdict; that it dispersed about 2 o'clock in the morning, and the jury did not make and return a verdict until between 7 and 8 o'clock on the morning after the trial. Two other bailiffs of the court, who were present during the trial, used this language in affidavits they made: "They were watchful to see that no trouble occurred in the way of lynching; that they were listening, and they heard but one pistol shot; they made mention of it at the time, and the pistol shot was not in the courthouse yard, or near the courthouse, but was some distance away."

Each one of the jurors who tried the case also testified by affidavit. They all agreed in the statement that they were not influenced by any demonstration; that the noise in the courthouse yard had no effect upon them as jurors; and that they were controlled alone by the evidence in the case, and endeavored to return a proper verdict, and they continued of the opinion that they had done so. Some of the jurors also testified that while the jury had the case under consideration there were some noisy demonstrations in the courthouse yard, but they could not distinguish what was said, nor did they believe that the

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demonstrations were meant to apply to the jury. Another testified that he could hear the crowd, but not what they said; nor did he pay any attention to this crowd; and nothing said by them had any influence on him. Still another juror, Mr. Foster, testified as follows: "That he was not influenced, in the verdict he rendered, by any demonstration made by anybody on the outside, and not connected with the case; that while confined in the jury room he heard considerable noise in the courthouse yard. 'I heard some one say, "If they don't make a verdict in thirty-five minutes, we will;" this is all I understood. This was about 11 o'clock p. m.;" that the noises in the courthouse yard had no effect upon him as a juror in the least; that he was controlled alone by the evidence in the case, and endeavored from the evidence to return what he thought and now thinks was a proper verdict. The jury had the case under consideration all night. The noise in the courthouse yard ceased about 2 o'clock in the morning, and the verdict was not reported and returned into court until between 7 and 8 o'clock in the morning." Among other affidavits submitted, was one from L. H. Crawford, to the following effect: "That he was at the courthouse in Dalton, Ga., from about 10 to about 1 o'clock on the night while the jury was out in the case of the State against Bill Collier, tried for rape; and deponent swears that while he was at said courthouse there was a boisterous crowd of from fifty to seventy-five people in and around the courthouse. Deponent says occasionally a portion of the crowd would line up in courthouse hall for the purpose of going to the jail, and a time or two they started to the jail, and got as far as the well in the courthouse yard. All the demonstration was in the hearing of the jury, and deponent believes the jury heard it. Deponent says that, while he was at the courthouse on said night, he heard a number of pistol shots which seemed to be between the courthouse and the jail." Another witness, G. M. Cannon, Jr., said that "he saw the demonstration in the courtroom; saw and heard a pistol shot in the yard or near by; heard loud and boisterous talk like this: 'If the jury does not hang him we will,' or something to that effect. Crowd remained around courthouse until probably 2 o'clock a. m."

This evidence clearly established that a second demonstration

was made by the crowd,—that is to say that after the jury had been charged, and had retired to consider their verdict, a very considerable number of people assembled in the courtroom, near to which was the jury room, and in the yard of the courthouse, and acted in a very boisterous manner. It cannot be doubted, from the evidence, that this demonstration was made against the accused, and it is more than inferable that the purpose of the demonstration was to secure from the jury a verdict of conviction. It would be mere idle talk to say that the jurors did not understand that the demonstration was against the prisoner on trial. It is true that each of the jurors testified that the noise and demonstration made by this crowd did not affect his verdict. Indeed, all of them but one testified that, while they heard the noises, they could not understand what was said. One of them did clearly understand that some persons in the crowd threatened violence to the prisoner if the jury did not return a verdict of guilty. It is a little significant that the two bailiffs who were in attendance on the court testified that they were watchful to see that no trouble occurred in the way of lynching, showing, evidently, that there was a fear that the prisoner would be lynched; and it is fair to assume that these fears were occasioned by the demonstrations of the crowd. We have no reason to, and do not, doubt that each member of the jury who testified was sincere and honest in his belief that his verdict was in no way affected by the demonstration during the progress of the trial, or by that which subsequently occurred while the jury were considering their verdict. But the question is not whether, in fact, the jurors were influenced by these demonstrations, but were the demonstrations calculated to influence the jurors in their action? In the case of *Woolfolk v. State*, 81 Ga. 551, 8 S. E. 724, our present chief justice, who delivered the opinion in that case, referring to a demonstration made by some one in the courtroom, who, during the progress of the trial, cried out in an excited and angry tone, "Hang him! Hang him! Hang him!" said: "All the jurors make affidavit that these things had no influence upon their minds. . . . But can any man say with certainty that such things have no influence upon him? Can any of us know how far our minds are influenced by applause or excitement of a crowd which sur-

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rounds us? Can any of us say, even in this court, that this or that piece of testimony, or this or that argument of counsel, has not influenced our minds? Can any of us say that, on the trial of one of the most heinous crimes ever committed in this State or any other, the applause of the crowd, the fierce cries of 'Hang him! Hang him!' from members of the crowd, followed later on by a repetition of the same cry, would have no influence upon our minds? Our minds are so constituted that it is impossible to say what impression scenes of this kind would make upon us, unless we had determined beforehand that the prisoner was guilty or innocent. The question here is, not what effect these things did have upon the minds of the jury, but what effect they were calculated to produce." In the case of *Smith v. Lovejoy*, 62 Ga. 372, Mr. Justice Jackson said: "The juror's mind might have been influenced by the version given to the case by the plaintiff, though he did not recognize the influence himself; therefore, what he swore, he might believe, yet impressions may have been made favorable to plaintiff, and against defendant." Chief Justice Warner, in delivering the opinion of this court in the case of *Daniel v. State*, 56 Ga. 653, said: "The policy of the law is to protect jurors from all such influences and temptations in the trial of criminal cases, as well as defendants who may be injured thereby." So, therefore, in determining whether the plaintiff in error has any cause of complaint on account of the demonstrations made in the courtroom during the trial, and subsequently both in the courtroom and courthouse yard while the jury were considering the case, the inquiry is not to be confined to the effect that such demonstrations actually had on the minds of the jurors, but the question to be determined is whether the demonstrations referred to were of such a nature as that they were calculated prejudicially to affect the jurors trying the case. Tested by this rule, it is apparent that the defendant did not have a fair and impartial trial, which the law guarantees to him, and to which he is entitled, be he guilty or innocent. The heinousness of the crime with which he was charged must not and cannot be allowed to affect the manner of his trial; and only by a fair and legal trial can his guilt be so established as to make him subject to the punishment which the law visits on offenders in



such a case. Without any reference to the correctness or incorrectness of the verdict rendered in the case, under the evidence which was submitted we must, in deference to the obligations which we have assumed, as we understand them, reverse the judgment of the court below, because the defendant's guilt has not been established by a fair and impartial trial in the manner contemplated by law.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

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SHAW v. STATE.

79 Miss. 21—30 So. Rep. 42.

Decided April 8, 1901.

**TRIAL: REASONABLE DOUBT:** *Right to confer with witnesses—Instructions—Approved instruction—Threats.*

1. It is a constitutional right that a defendant in a criminal case may confer with his witnesses, before presenting his defense; even though the witnesses are under the rule.
2. It was error for the court to modify the following instruction: "A reasonable doubt of defendant's guilt, arising out of any part of the evidence, after consideration of all of the testimony, by the jury, will justify their acquittal of the defendant."
3. In a homicide case it is not proper to show threats made by defendant against a brother of the deceased seven or eight months before the homicide in question.

Appeal from the Circuit Court, Oktibbeha County; Hon. E. O. Sykes, Judge.

Wafer Shaw, convicted of manslaughter, appeals. Reversed.

Indictment for murder. On the trial all witnesses were put under the rule. After the State rested, the defendant moved for permission to confer personally with his witnesses before presenting his defense. The motion was overruled.

*Carroll & Magruder*, for the appellant.

*J. W. Barron* and *Monroe McClurg*, Attorney General, for the State.

CALHOON, J. It was fatal error to refuse the defendant the privilege of conferring with his own witnesses, whether they were under the rule or not. This has been so held where his counsel were refused this right. *White v. State*, 52 Miss. 216; *Allen v. State*, 61 Miss. 627. And very much more is this so in reference to the defendant himself. The denial was an invasion of his constitutional right. It is often of vital importance that both defendant and his counsel should, together, confer with his witnesses in the progress of a trial. The right cannot be restricted, except that the trial court may impose reasonable limitations as to the length of time of the conference.

Instruction No. 11 for the defendant should have been given as asked. It was in these words: "A reasonable doubt of defendant's guilt, arising out of any part of the evidence, after consideration of all the testimony by the jury, will justify their acquittal of the defendant." The court modified it to read as follows: "A reasonable doubt of defendant's guilt, as to a material fact, arising out of any part of the evidence, after consideration of all the testimony by the jury, will justify their acquittal of the defendant."

The modification was error. None but *material facts* should be permitted to go to the jury, and they are not to be *required* to discuss the *materiality* of testimony. It suffices the defendant if, from the whole or any part of the evidence, or the lack of evidence, or the incredibility of witnesses, a reasonable doubt arises in the minds of the jurors. It is a reasonable doubt, from the case made, of defendant's guilt, not of any particular material fact which authorizes acquittal.

The witness Measles should not have been permitted, as we think, to testify to threats of defendant, made seven or eight months before, against the brother of the deceased.

Reversed and remanded.

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## SHAW V. STATE..

79 Miss. 577—31 So. Rep. 209.

Decided January 20, 1902.

*TRIAL: Misconduct of sheriff—Evidence of jurors.*

1. After the jury had been deliberating about two hours on a Saturday afternoon the sheriff remarked within the hearing of the jury, that unless a verdict was immediately returned, the jury would be held until Monday, as the judge was going home in a few minutes. A verdict was then returned within five minutes. *Held*, cause for new trial.
2. A juror should not be admitted as a witness to prove his own misconduct or what took place in the jury room or the grounds on which the verdict is based; but is competent to prove misconduct by others.

Appeal from the Circuit Court, Oktibbeha County; Hon. E. O. Sykes, Judge.

Wafer Shaw, convicted of manslaughter, appeals. Reversed.

Appellant, indicted for murder at the May term, 1900, was tried, and was convicted for manslaughter; but the judgment was reversed. *Shaw v. State*, 79 Miss. 21, 30 So. Rep. 42, 12 Am. Crim. Rep. 616. The case was again tried, on Saturday the first week of the May term, 1901. The jury retired about 2:30 o'clock, and having been out about two hours the sheriff called out to the officer in charge of the jury, as stated in the opinion, and a verdict was then returned in five minutes.

In support of motion for new trial, jurors were offered to show the misconduct of the sheriff, but the court, on objection, refused to hear them.

*Carroll & Magruder*, for the appellant.

*Monroe McClurg*, Attorney General, for the State.

CALHOON, J. The grossly improper conduct of the sheriff vitates this verdict. From his own testimony, not objected to, it appears that "just for mischief, more than anything else," he called to the bailiff in charge of the trial jury "that the judge was going home this evening, and that they would have to stay there until Monday morning." It is hardly possible that the jury did not hear this. Jurors were offered to show that the

sheriff called to the jury "that the judge would leave for home in a few minutes, and, unless they would return a verdict at once, they would be held until the following Monday." The result was a verdict in five minutes. The court refused the testimony of the jurors as an impeachment of their verdict. We think the testimony of the jurors competent. Jurors may not be heard to impeach their verdict by their own misconduct, or by what took place in their private room, or because of the grounds on which they found their verdict, but are competent to show the misconduct of others. *Thomp. & M. Juries*, §§ 447, 448; *Nelms v. State*, 13 Smedes & M. 500, 53 Am. Dec. 94; *Barnett v. Eaton*, 62 Miss. 768. Such communications to the jury are presumed to be prejudicial, and necessitate reversal. *Senior v. Brogan*, 66 Miss. 178, 6 So. Rep. 649; *Brown v. State*, 69 Miss. 398, 10 South. 579; *Maury v. State*, 68 Miss. 605-608, 9 So. Rep. 445, 24 Am. St. Rep. 291. There is no evidence that the misconduct of the sheriff worked no injury. The influence of the declaration of so high an officer is much graver than if made by an outsider.

Reversed and remanded.

NOTE.—See subject of "Judge and Jury" in the index of 11 Am. Crim. Rep., as to influence brought to bear on jurors while deliberating on a criminal case.

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### STATE v. KIEFER.

16 S. D. 180—91 N. W. Rep. 1117.

Decided October 13, 1902.

TRIAL: *Communication between judge and jury as to clemency—Affidavits of jurors to impeach verdict.*

1. While the jury was deliberating as to a verdict, the foreman sent the following communication to the judge: "Can the jury recommend the defendant to the mercy of the court?" The judge replied: "Yes; and I have made it an invariable rule . . . to follow such recommendations." *Held*, reversible error.
2. Affidavits of jurors not admissible to impeach their verdict.

Error to Circuit Court, Meade County; Hon. Frank Washbaugh, Judge.

Nicholas Kiefer, convicted of larceny, brings error. Reversed.

*Michael McMahon*, for plaintiff in error.

*J. F. McClurg*, State's Attorney.

CORSON, J. Upon an information duly filed, charging the plaintiff in error with the crime of grand larceny, he was tried, convicted, and sentenced to a term in the State's prison. A motion for new trial was made and denied. The case is now before us on writ of error issued out of this court. The plaintiff in error seeks a reversal of the judgment of the court below on three grounds: First, alleged error of the court in denying the challenge of the plaintiff in error to the panel of jurors summoned by the officer, on the ground that the officer was disqualified to summon the same by reason of bias; second, for the alleged error of the court in denying the challenge of the plaintiff in error to a certain other panel summoned by the said officer on the same ground; third, alleged error on the part of the court in instructing the jury or in answering a question of the jury. In the view we take of the case it will not be necessary to consider the first two questions presented, as these may not arise on another trial. The third question was presented to the court on the motion for new trial by the affidavit of one of the jurors, and certificates of two other jurors annexed thereto. In this affidavit the juror states that the jury was influenced in arriving at its verdict by reason of the reply of the judge to the communication of the foreman of the jury.

It is contended by the attorney for the State that the affidavit of the juror was inadmissible, and should not have been considered by the court. This, no doubt, is correct. This affidavit, however, seems to have been disregarded by the court, and properly so. It may be regarded as settled law in this State that the affidavits of jurors cannot be received by the court to impeach their verdict. *Edward Thompson Co. v. Gunderson*, 10 S. D. 43, 71 N. W. 764; *Murphy v. Murphy*, 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820; *Gaines v. White*, 1 S. D. 434, 47 N. W. 524; *Ulrick v. Trust Co.*, 2 S. D. 285, 49 N. W. 1054; *Territory v. King*, 6 Dak. 131, 50 N. W. 623. The rec-

ord, however, discloses the fact, independently of the juror's affidavit, that the foreman of the jury did propound to the court a certain question, and that the court made a reply thereto. In the bill of exceptions the then circuit judge has certified that the following proceedings took place on the trial of the action: "The court states: That, while the jury in the above-entitled action were deliberating as to what their verdict should be, a written communication was sent to the court, signed by the foreman of the jury in said case, asking, in substance: 'Can the jury recommend the defendant to the mercy of the court?' That thereupon the judge indorsed upon the same paper an answer, in substance, as follows: 'Yes; and I have made it an invariable rule . . . to follow such recommendations.' And no other communication passed between the judge and the jury." This proceeding on the part of the court was clearly error. The answer to the question, while not strictly in the nature of an instruction or charge by the court, was nevertheless information conveyed to the jury, while deliberating upon their verdict, calculated to influence them. It will be observed that the court informed the jury that he had made it an invariable rule to follow the recommendations of the jury. Such a statement to the jury in a doubtful case might reasonably be presumed to influence the jurors in arriving at their verdict. In *McBean v. State*, 83 Wis. 206, 53 N. W. 497, the Supreme Court of Wisconsin, in a case quite analogous to the one at bar, granted to the plaintiff in error a new trial for the reason that the trial court in that case erred in answering a request of the foreman of the jury which was as follows: "If we bring a verdict of guilty, can we depend on the clemency of the court?" To which the trial court answered in effect that they could, or "Yes." The jury thereupon returned a verdict of guilty, and the case was taken to the Supreme Court on writ of error. In reversing the judgment, that court says: "Had the trial judge, during the delivery of his charge, or at its conclusion, and in open court, given such an answer to such a question put by a jurymen, no one, we apprehend, would have contended that it was not error. No attempt here has been made to justify such answer to such a question. . . . The promise thus secured was well calculated to overcome reasonable doubts, and coerce

an agreement for conviction. It was an unauthorized interference with the deliberations of the jury. *Ryan v. Insurance Co.*, 77 Wis. 611, 46 N. W. 885. 'A verdict is a declaration of truth as to the matters of fact submitted to the jury.' *Shenners v. Railroad Co.*, 78 Wis. 387, 47 N. W. 622. To be such truth, however, it must be based wholly upon the evidence in the case. A verdict in disregard of such evidence, in whole or in part, is a false verdict. It follows that any promise, pledge, or declaration of the trial judge, calculated to draw the attention of the jury away from the evidence, and to induce them to base their verdict upon ulterior considerations, is necessarily misleading, and hence erroneous." It is true that in the case at bar the trial judge did not distinctly agree, in terms, that the jury could depend on the clemency of the court; but the language used by him was, in effect, an agreement or statement that the jury could rely upon the clemency of the court. The learned judge said, "I have made it an invariable rule . . . to follow such recommendation." The jurors might very naturally conclude from the language used that they could rely upon him to extend clemency to the accused in case he should be convicted, and it might have the effect to induce the jurors to disregard any reasonable doubts they might have as to the guilt of the accused. Jurors, in the discharge of their duties, have nothing to do regarding the punishment to be inflicted upon the accused, as the extent of the punishment is left entirely to the discretion of the court, within certain limitations prescribed by statute. And while it is the duty of the court to instruct the jury upon the law of the case, it should not in any manner attempt to influence its deliberations, and the court should be exceedingly careful to refrain from all expressions of opinion that might be calculated to influence the minds of the jurors. Undoubtedly the learned Circuit Court, in replying to the request of the foreman of the jury, was actuated by no improper motive, but the proceeding is a dangerous one, and cannot be sanctioned by this court.

The learned State's attorney has called our attention to the case of *Lovett v. State* (Fla.) 11 South. 550, 17 L. R. A. 705, and *Gandolfo v. State*, 11 Ohio St. 114. It appears from the former case that the State of Florida had a statute providing



that in homicide cases, where the majority of the jury should recommend the prisoner to the mercy of the court, it should have the effect of reducing the punishment from death to imprisonment for life,—practically, in effect, the same as our own statute upon this subject. In view of the provisions of the statute, the instruction was held proper. In the latter case the only irregularity complained of was that of the court in sending the statutes of the State to the jury, on their request, with a reference to certain sections bearing upon the matter they were considering. The learned Supreme Court of Ohio arrived at the conclusion that, as no rule of law governing the trial of criminal cases was violated, it was not error, as the court could not say the act operated or might have operated to the prejudice of the defendant. The authorities cited, therefore, do not sustain the proceedings of the trial court in the case at bar.

In our opinion, the action of the trial court was unauthorized and irregular; and, as it may have prejudiced the plaintiff in error, the case must be reversed, and a new trial granted. It is so ordered.

NOTE.—See subject of "Judge and Jury" in the index of 11 Am. Crim. Rep.

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WILKERSON v. STATE.

78 Miss. 356—29 So. Rep. 170.

Decided January 21, 1901.

*TRIAL: Prejudicial communication by bailiff to jury.*

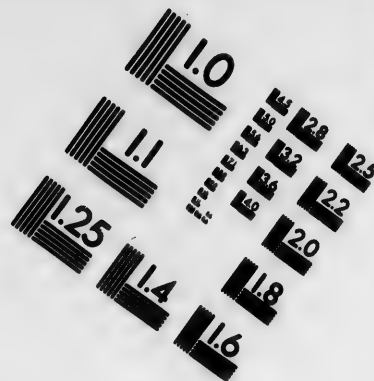
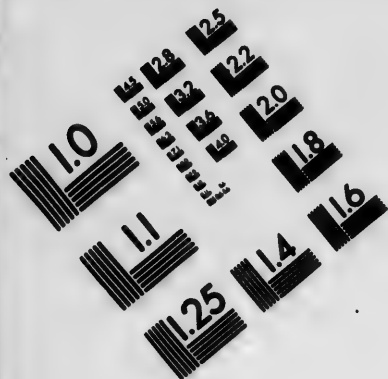
About an hour and a half after the case was given to the jury, one of the jurors inquired of the bailiff, as to the difference between burglary and petit larceny; then communicated the answer to the other jurors; after which a verdict was immediately agreed upon. Held, ground for new trial.

Appeal from Circuit Court, Marshall County; Z. M. Stephens, Judge.

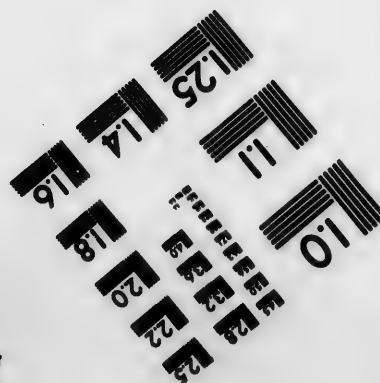
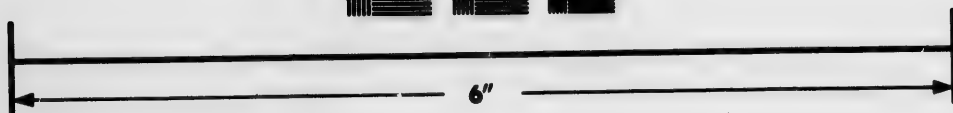
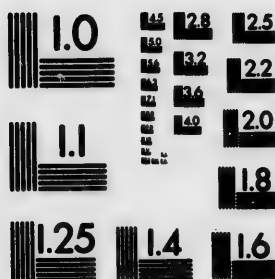
John Wilkerson was convicted of burglary and petit larceny, and he appeals. Reversed.

*Fant & Fant*, for appellant.

*Monroe McClurg*, Attorney General, for the State.



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TERRAL, J. The appellant was indicted in the Circuit Court of Marshall County for burglary and grand larceny, and was convicted of burglary and petit larceny, and was sentenced to the penitentiary for one year. From this judgment he appeals.

The action of the court upon the evidence and the instructions is assigned for error, but upon the whole case it is so clearly right that the defendant is left no room to complain in that behalf.

He further complains of the trial because of the conduct of one of the bailiffs in charge of the jury which convicted him. In regard to this matter it was shown that Will Bond and Clayton Humphreys were the sworn bailiffs in charge of the jury, and that about an hour and a half after the case had been submitted to the jury one of the jury opened the door and asked Bailiff Bond the difference between burglary and larceny and burglary and petit larceny, and Bond replied that the first would send the prisoner to the penitentiary, and the other would send him to the county farm; that the juror reported to his fellows what had occurred and what the bailiff said; and that immediately they made up their verdict. The question therefore presented is, what was the probable effect of the statement made by Bond to the jury? Was it wrongful and hurtful? Did it tend to affect their finding? In the trial of capital cases it is the rule and practice to swear the bailiffs who attend the jury, specifically, *inter alia*, that they will keep the jury together, and will not suffer them to separate or depart the one from the other, and that they will not speak to them touching the case in hand, and will not suffer any other person to speak to them on any subject whatever. In the trial of all felonies the duties of the attending bailiffs are the same, and what is specifically sworn to by the bailiffs in capital cases is the bounden duty of the officers in all felonies. Nor is it less their duty in misdemeanors and in civil cases, though the consequence of a violation of the rule in the last-named cases is not so seriously regarded as it is in cases of felony. And, lest such matter may not be fully known to the ministerial officers of the court, or may not be regarded by them as of importance, it is the duty of the trial judge to give the sheriff, his deputy, and his bailiffs specific instructions as to their respective duties, one of which

is, undoubtedly, that they should not speak to the jury touching the case on trial. Indeed, it is highly improper for officers to hold unnecessary converse with the members of the jury while they have a case in consideration; but to speak of the case itself, and especially of a matter of importance relating to it, is a great contempt of the authority of the court, and may result in irreparable harm. We are of the opinion that the record sustains the presumption that the statement made to the jury by the bailiff may have had a decided effect upon the verdict. The jury had retired from the bar, and had been in consideration of the case for an hour and a half, and upon receiving the statement of Bond they immediately made up their verdict. According to the statement of Bond as to what the law of the case was, the verdict rendered was for a misdemeanor, or was so intended, while the crime proven, in any view of the evidence, was a felony. The statement of Bond was erroneous and untrue in law and in fact, but the mischief is not the less on that account. If it could be known, which it is now impossible to know, that the verdict when rendered, if no such statement had been made, would have been just as the one rendered, that would not change the law of the case. The atmosphere of the case, if the figure be allowable, as shown by the record, discloses a purpose to deal gently with the defendant, a young man thought to have been led astray by others. For the breaking into the dwelling house of a neighbor, while the family was absent, by bursting open the outer rear door with an ax, and of stealing 30-odd dollars, clearly proven, the judgment recites that he was sentenced for "one full" year to the penitentiary, whereas common justice and practice would have sent him up for several years. The hesitation of the jury in convicting him promptly upon certain evidence of unmistakable guilt, fortified by his own testimony to facts which left no room for doubt of his guilt, raises, as we think, a reasonable suspicion that the verdict was the result of the statement of Bond. By section 729, of the Code it is made a contempt of court for an officer to converse with a juror after the jury has retired from the bar, save by order of the court, upon any—even an immaterial—subject; but to talk with them, or with one of them, while in retirement, concerning material points in the case, is a much more serious mat-

ter. Such communication, in our judgment, affects the integrity and purity of the verdict, and it cannot be permitted to stand. It is to be hoped that the learned court inflicted merited punishment upon the erring bailiff; otherwise, it may not be hoped to stop a practice so shameful to trial courts in the administration of justice. Reversed and remanded.

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STATE V. DREANY, et al.

65 Kan. 292—69 Pac. Rep. 182.

Decided June 7, 1902.

**TRIAL: CONSPIRACY:** \* *Information charging conspiracy in restraint of trade—Evidence—Right to a fair and impartial trial, including the right of counsel and the services of a clerk or stenographer—Challenges.*

1. In an information charging a criminal conspiracy in the entering into an agreement in restraint of trade, and in restraint of competition in trade, and pooling and fixing the price of an article of trade or commerce, it is necessary to aver the names of all parties to such conspiracy known to the prosecution; but it is not essential to the sufficiency of the information that all such parties be jointly charged with the commission of the offense.
2. Each defendant jointly tried upon a criminal charge is entitled to peremptorily challenge the number of jurors permitted by statute in such case; but the number of peremptory challenges allowed the State is not thereby augmented, but remains the same whether the number of defendants on trial is one or many.
3. A defendant placed upon his trial, charged with the commission of a crime, is entitled to a fair and impartial public trial, to be represented by counsel, and to the services of a clerk or stenographer to assist such counsel in the preparation of the defense, if desired by the defendant, and it is error to deprive a defendant of such right.
4. Upon a prosecution for a criminal conspiracy in restraint of trade or commerce, or in restraint of competition in trade or commerce, or in pooling and fixing the price of an article of trade or commerce, parol evidence is admissible to prove the contents of a written agreement alleged to have been entered into in furtherance of such conspiracy, when the existence and execution of such agreement is first established, and it is further shown such agreement is not in the possession or under the control of the prosecution, and the State cannot secure or compel its production.

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\*See CONSPIRACY in Table of Topics; also 11 Am. Crim. Rep. 667.

5. Before a defendant may be convicted upon a charge of criminal conspiracy, it must be shown he knew of and participated in such conspiracy.

(Syllabus by the Court.)

Appeal from the District Court, Rush County; Hon. J. E. Andrews, Judge.

Henry Dreany and another, convicted of conspiracy in restraint of trade, appeal. Reversed.

*Samuel Jones, E. C. Cole and W. H. Russell*, for the appellants.

*A. A. Godard*, Attorney General, *J. W. McCormick* and *H. L. Anderson*, for the State.

POLLOCK, J. Appellants, Henry Dreany, the vice president, treasurer, and general manager, and J. F. Shotts, the president, of the Ia Crosse Lumber & Grain Company, a corporation, were arrested and tried upon a charge of combining and entering into an unlawful agreement with others named to pool and fix the price to be paid for grain at the town of Bison, Kan. This appeal is prosecuted from a judgment of conviction. Many grounds of error are assigned. We shall refer to only such as are deemed material to the issue.

It is first contended by counsel for appellants that the information is fatally defective, and should have been quashed, because all those who are alleged to have entered into the unlawful combination, in so far as known by the prosecuting officer of the State, should have been jointly charged in the information, and because neither the terms of the agreement entered into nor its nature are pleaded. This being a prosecution for a conspiracy in restraint of trade, the information should allege the names of all those parties to the conspiracy known to the prosecuting officer. This the information does allege. But, while this is true, it is not incumbent upon the prosecution to jointly charge all those alleged to have participated in the unlawful undertaking. *Heine v. Commonwealth*, 91 Pa. 145; *People v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. Rep. 725; *United States v. Miller*, 3 Hughes, 553, Fed. Cas. No. 15,774. The information alleges: "Defendants did then and there unlawfully enter into an agreement, contract, and combination, in the county and



State aforesaid, in the name of the I. A. Cross Lumber & Grain Company aforesaid, with divers and sundry other persons, partnerships, companies, and corporations, to wit, [naming them], who were at the said time and place competitive grain buyers and dealers at Bison, Rush County, Kansas, . . . which said agreement, contract, and combination was designed and entered into with the intent then and there and thereafter to establish, settle, and fix the price the said grain dealers and buyers should pay for grain at said place, to divide the net earnings and proceeds of said grain buyers and dealers at said place, and to prevent competition between said grain dealers and buyers in the purchase, sale, and transportation of grain by the said grain buyers and dealers at said place." We are of the opinion these allegations contain a sufficient statement of the persons confederating together, and the nature of the contract entered into, to fully apprise defendants of the nature and character of the offense charged, and that the motion to quash was properly overruled.

Under the provisions of the Criminal Code defendants jointly tried were each entitled to challenge peremptorily four jurors. *State v. Durein*, 29 Kan. 688. At the trial it was contended for by the prosecution, and the court awarded to the State, two peremptory challenges for each defendant on trial. Counsel for appellants insist this is error. With this insistence we agree. The Criminal Code (section 198) provides: "The defendant in every indictment or information shall be entitled to a peremptory challenge of jurors in the following cases, as follows: . . . Fourth. In cases not punishable with death or imprisonment in the penitentiary, to the number of four, and no more." Section 199 provides: "In all criminal trials the State may challenge peremptorily half the number of jurors allowed the defendant by the preceding section." Mr. Thompson, in his work on Trials (volume 1, § 45), says: "Although the defendants so jointly indicted may severally be permitted the statutory number of challenges, this does not increase the number allowed to the State beyond the number allowed to it in the case of a single defendant. The prosecution cannot complain of this, since it is a matter of its own choice to proceed against the defendants jointly, when it might have proceeded against them severally."

The authorities in States having statutory provisions somewhat similar to our own fully support this rule. *Mahan v. State*, 10 Ohio, 232; *Savage v. State*, 18 Fla. 909; *State v. Earle*, 24 La. Ann. 38, 13 Am. Rep. 109; *State v. Gay*, 25 La. Ann. 472; *Wiggins v. State*, 1 Lea, 738; *Shoeffler v. State*, 3 Wis. 823.

Again, the record shows at the trial counsel for defendants were accompanied by the official court stenographer of the Twentieth Judicial District, acting in the capacity of a private stenographer for counsel, employed by defendants for the purpose of taking notes of the testimony and performing other clerical matters in the progress of the trial for the use of counsel for defendants. Upon objection made by the county attorney, such private stenographer was refused by the court permission to take notes in open court of the evidence of witnesses and other matters occurring in the progress of the trial. This was error. It is the right of one put upon trial for a criminal offense to have a public trial, to be represented by counsel, and in all things to have opportunity for a full and fair investigation of the charge brought against him, and to prepare for and present his defense thereto. If in the progress of this trial counsel for defendants desired the services of a private stenographer or clerk to assist them in the discharge of their duties, defendants had the right to employ such assistant, and had the right to his presence in the court room and his aid during the trial; and it is error to deny such right, if request therefor is made as in this case, in a proper manner, and such request is reasonable, and the person so employed demeans himself in a proper manner, toward the court. As tending to support this position, see *People v. Hartman*, 103 Cal. 242, 37 Pac. 153, 42 Am. St. Rep. 108; *People v. Murray*, 89 Mich. 276, 50 N. W. 995, 14 L. R. A. 809, 28 Am. St. Rep. 294.

Again, it is contended the court erred in the reception of parol evidence as to the contents of the written agreement executed by the parties alleged to have participated in the conspiracy. It appears from the record that the county attorney served notice upon defendants to produce this written agreement at the trial. It does not appear such writing was in the possession of or under the control of defendants. It does appear the written instrument was not in the possession or under the control of the prose-

cuting attorney. It is clear that, if such writing is shown to be in the possession of the defendants, they could not be compelled, by notice or otherwise, to produce it as evidence to be used in a prosecution against them. It is further apparent that, if such writing were shown to be in the possession of defendants, it would be as completely lost to the prosecution, so far as any power existed to procure it as evidence upon the trial, as though it were lost or destroyed altogether. And in such case parol evidence of its contents has been held admissible by this court. *State v. Gurnee*, 14 Kan. 111. As the writing in question was not in the possession of nor under the control of the prosecution, and as it was not within the power of the State to produce it at the trial, we are inclined to the opinion that it was not error to receive secondary evidence of its contents after proof duly made of its existence and execution. Mr. Wharton, in his work on Criminal Evidence (8th ed., § 216), says: "In criminal issues, the fact that the indictment charges the defendant with stealing or in any other way misappropriating a particular document is a sufficient notice to the defendant to produce the document; and under such circumstances parol evidence of the document is admissible without due notice to produce. Nor is it necessary that the indictment should aver the loss or destruction of the document. The same rule has been applied, under an indictment for administering an unlawful oath, to enable the prosecution to prove by parol the paper from which the oath was read, without notice to produce the paper."

Again, it is contended the evidence was wholly insufficient to warrant a conviction of defendant Shotts. It was admitted upon the trial that he was the president of the La Crosse Lumber & Grain Company. It was not shown, however, that he was present at any meeting of the parties preliminary to the making of the unlawful agreement. He did not sign the same, and it is not shown he had any knowledge of the unlawful agreement, or in any way actively participated in the matter. Neither is it shown the agreement was signed by the corporation of which he was the president. The evidence was therefore utterly insufficient to connect him with the guilty transaction or to sustain a conviction against him.

Other errors are assigned; but, as they are such as will probably not recur upon a further trial, they need not be considered. It follows the judgment must be reversed, with directions to grant the defendant Dreany a new trial and to discharge defendant Shotts. It is so ordered. All the justices concurring.

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VICKERS v. PEOPLE.

31 Colo. 491—73 Pac. Rep. 845.

Decided October 5, 1903.

**TRIAL:** *Demurrer to information—Character witness—Witness in court room after rule to exclude.*

1. When an information is duly verified, a demurrer, supported by an affidavit of the same person who verified the information, denying personal knowledge of the facts, should be overruled.
2. A witness who resided far distant from defendant, testified that defendant's reputation was bad; but it appearing on cross-examination that he did not know the defendant's reputation, except by talking with three persons. *Held*, the evidence should have been stricken out.
3. When the defendant is not at fault, it is error to reject one of his witnesses, simply because the witness had been in the court room a few minutes in violation of rule to exclude witnesses.

Error to District Court, Teller County.

James W. Vickers, convicted of an assault with intent to kill, brings error. Reversed.

*John R. Smith*, for plaintiff in error.

*N. C. Miller*, Attorney General, and *H. C. Hersey* and *I. B. Melville*, Assistant Attorneys General, for the people.

STEELE, J. An information duly verified by Joseph A. Tawney was filed in the District Court within and for the County of Teller, charging that the defendant on March 21, 1901, did make an assault upon the person of Peter Enzenauer, with the intent then and there to kill and murder. A demurrer upon the ground that the information was not verified by a per-

son having personal knowledge of the facts alleged in the information (the defendant not having had or waived a preliminary examination) was interposed, supported by the affidavit of Tawney. Tawney alleges in his affidavit that he is the person who verified the information, and that he had no personal knowledge of the facts alleged in the information. The demurrer was overruled.

Upon the request of the defendant, an order was made by the court, excluding the witnesses from the court room. Dr. James Green was called as a witness for the defendant. It appearing that the witness was in the court room for a period of fifteen or twenty minutes while witnesses were testifying, the court refused to permit him to testify. The defendant offered to show that the witness was regularly subpoenaed by the State; that he was informed by the district attorney that he would not be called by the prosecution, and that as soon as it was known that he was in the courtroom the attorneys for the defendant requested him to leave, and that he did then leave, the courtroom. There was no showing made that the witness remained in the courtroom by procurement of the defendant. The offer of proof was that the witness dressed the wounds of the injured man, and that certain contradictory statements were made by him to the witness. The witness Burnside, residing at the town of Divide, was permitted to testify, over the objection of the defendant, concerning the general reputation of the defendant. Upon cross-examination it was shown that the defendant resided at the town of Balfour, thirty miles distant from the residence of the witness, and that the witness based his knowledge of the reputation of the defendant upon statements made to him by persons who claimed they resided at Balfour; that the witness had never been in Balfour, and did not know where the persons with whom he had conversed resided. The jury returned a verdict finding the defendant guilty. The defendant brings the case here for review, alleging numerous errors. We shall consider those assignments only which allege that the court erred in overruling the demurrer, in refusing to permit the witness Green to testify, and in denying the motion to strike the testimony of the witness Burnside.

The demurrer was properly overruled. It was held in the recent case of *Barr v. People*, 30 Colo. —, 71 Pac. 392, citing *Holt v. People*, 23 Colo. 1, 45 Pac. 374, that, when an affidavit is made as the basis of an information in conformity with the requirements of the statute, it is not in the power of the accused to attack, by counter affidavit or otherwise, the truth of its material statements.

Although the witness Burnside qualified himself on the direct examination, upon cross-examination it was shown that he did not know the general reputation of the defendant in the community where the defendant resided at or about the time of the trial. Burnside did not reside in the same neighborhood with the defendant. In support of his statement that he knew the general reputation of the defendant, and that it was bad, witness said, when asked how many persons he had talked with upon the subject of defendant's reputation, "Two that worked for him, and one neighbor." The witness was clearly incompetent to testify to the general reputation of the defendant, and the proper practice required the testimony to be stricken upon motion, and the jury instructed to disregard it.

The most serious error, and that which requires the reversal of the judgment, is found in the refusal of the court to permit the witness Green to testify. There was no showing that the defendant was instrumental in procuring the witness to remain in the courtroom, and nothing appears in the record which would justify us in holding that the court found that the defendant connived at the disobedience of the rule by the witness. We have recently held, quoting with approval a decision of the Court of Appeals, that: "The prevailing doctrine is that the violation of such an order by witnesses will not deprive the party, whose witness he is, of the benefit of his testimony, if the party himself is without fault. But where the order has been disobeyed by the consent or procurement of the party seeking to use the witness, the court may, in the exercise of a sound discretion, refuse to receive the testimony." *Bahrman v. Terry*, 30 Colo. —, 71 Pac. 1118. The defendant offered to show that, as soon as counsel knew of the witness' presence in the courtroom, he was requested to leave, and did then and there depart; and the court

appeared to have refused to permit the witness to testify solely because of the violation of the rule, and not because it appeared that the defendant was in any way responsible for the witness' presence, or consented to his remaining in the courtroom.

For the reasons given, the judgment is reversed. Reversed.

NOTE (by J. F. G.).—We have not examined the Colorado statutes in this regard; but it seems unusual to *support a demurrer by affidavit*. Had there been a motion to quash, support by the affidavit of the person who verified the information; or a special plea filed, it may be doubted whether the information should have been sustained. As to affidavits made without personal knowledge, see 11 Am. Crim. Rep., pages 298, 302, 349, 356, 372 and 373; also *State v. McGahey*, 97 N. W. Rep. 865; also *Rice v. Ames*, and notes in present volume.

As to exclusion of witnesses, see next case and notes.

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### PILE V. STATE.

107 Tenn. 532—64 S. W. Rep. 477.

Decided September 23, 1901.

TRIAL: *Witness in court room in violation of rule to exclude witnesses.*

A witness for defendant, coming from a distance and arriving at court after rule entered to exclude witnesses from the court room, and remaining there without knowledge of rule, and without knowledge of defendant or his counsel, should not be rejected.

Error to Circuit Court, Union County; Hon. W. R. Hicks, Judge.

Wayne Pile, convicted of an assault with intent to commit voluntary manslaughter, brings error. Reversed.

*J. C. J. Williams*, for plaintiff in error.

*G. W. Pickle*, Attorney General, for the State.

CALDWELL, J. Wayne Pile, the plaintiff in error, is under conviction for an assault on John Nelson, the prosecutor, with intent to commit voluntary manslaughter. A. J. Campbell, one of the State's witnesses, testified that he heard Pile, while talking with George Fox, some time before the encounter, make a



violent threat against Nelson. Pile offered to contradict that testimony in *toto* by George Fox, but the court refused to permit Fox to be examined because he had heard some of the State's evidence, and had not been under the rule with the other witnesses. An investigation disclosed the fact that Fox resided some distance from the county seat; that he was not present when the court commenced, and was not expected for some hours; that he arrived late in the day, but sooner than was anticipated, and went into the court room, and there remained, as he supposed it was his duty to do; and that this occurred without the knowledge of the defendant or his counsel. This disclosure, in our opinion, made a clear and obvious case for the admission of the proposed testimony. The intended witness was entirely without fault, and so were the defendant and his counsel. The testimony rejected was very material to the defense, and might have changed the result. Such being true, the testimony should, undoubtedly, have been admitted. *Smith v. State*, 4 Lea, 428. Reverse, and remand for a new trial.

NOTES (by J. F. G.).—

*A Georgia Case.*—In *Hoxie v. State*, 114 Ga. 19, 39 S. E. Rep. 944, decided November 5, 1901, the court said:

"In several grounds of the motion for a new trial error is assigned upon the action of the court in allowing three of the State's witnesses to testify, who, notwithstanding they had been 'put under the rule,' remained in the court room, and heard a portion of the testimony. It appears that two of these witnesses were deputy sheriffs, and that the court permitted them to remain for the reason that their services were needed. The remaining one of these witnesses heard the testimony of only one witness for the State, and was examined as to matters concerning which he did not testify. Aside from all this, it has been held by this court that, even where a witness who has been sequestered, disobeys the order of the court, and hears the testimony, he is not, for this reason, disqualified from himself testifying in the case. See *May v. State*, 90 Ga. 800, 17 S. E. Rep. 108, and cases cited."

*A Kentucky Case.*—In *Gilbert v. Commonwealth*, 23 Ky. Law Rep. 1094, 64 S. W. Rep. 864, decided October 18, 1901, the court said:

"It appears that Robert Fields was in the court house and heard the testimony introduced by the Commonwealth. The representative of the Commonwealth then discovered that he was an important witness for it, and would give testimony strongly tending to establish the guilt of appellant. The appellant objected to Fields testifying, because he had been in the court room during the introduction of testimony by the Commonwealth. The Commonwealth's attorney stated that he was

not advised that Fields would testify to the facts at the time of the introduction of the other testimony. The court permitted him to testify. This court has held that the provision of the Code which authorizes the court to exclude the witnesses from the court room pending the trial is not mandatory, but the court has a sound discretion in the enforcement of the rule. *Johnson v. Clem*, 82 Ky. 87; *Baker v. Commonwealth* (Ky.), 50 S. W. Rep. 54. The Commonwealth had discovered an important witness, and it would not have been the exercise of a sound discretion to have allowed the jury to return a verdict of not guilty when there was a witness in court who would prove facts that would have authorized the jury to return a verdict of guilty. Had the court not done so, a man guilty of a heinous crime, might have escaped punishment."

*A Mississippi Case.*—In *Taylor v. State* (Miss.), 30 So. Rep. 657, decided November 11, 1901, the court said:

"The examination of Shannon as a witness for the State, who remained in the court room after an order for the exclusion of the witnesses from the room was made, was in the discretion of the court."

*A Texas Case.*—In *Cauthern v. State* (Texas), 61 S. W. Rep. 96, decided October 30, 1901, the court said:

"Appellant insists the court erred in failing to permit him to prove by the witness Tobe Hasley that, on the following day after the difficulty wherein defendant is charged with an assault on Jim Still, said Jim Still stated in his presence that at the time he assaulted W. M. Cauthern, the brother of defendant, he thought he was assaulting defendant, as he did not at that time know them apart, they being twins and very much alike, which he contends was material to his defense, to prove that said Still was the aggressor in the difficulty with W. M. Cauthern, to show the state of mind of said Still towards defendant at the time of the difficulty, and to contradict said Still's testimony. The court qualifies this bill, to wit: 'This witness came into the court house, and had heard a part of the testimony of the witness J. C. Martin while the witnesses were under the rule. The defense also wanted to use this witness to impeach Still, for which no predicate had been laid.' It is within the sound discretion of the trial court to permit the introduction of testimony of witnesses who are not under the rule, when the rule has been invoked by either side, and, in the absence of an abuse of this discretion, we will not reverse the case. An inspection of this record does not show an abuse of discretion by the trial court. Furthermore, we note the explanation shows that no predicate was laid for the introduction of the testimony. This of itself would exclude said testimony."

## CARTER v. STATE.

78 Miss. 348—29 So. Rep. 148.

Decided January 21, 1901.

TRIALS\* SEPARATION OF JURORS in felony cases—Common-law rule—Presumption as to affect—Burden on the State to remove that presumption.

1. According to the common law, jurors impaneled to try a felony case, are not permitted to withdraw from the bar, except in the charge of an officer, sworn to attend them.
2. A violation of this rule is presumed to be prejudicial to the defendant's interest; unless the contrary clearly appears by evidence

Appeal from the Circuit Court, Sunflower County; Hon. F. E. Larkin, Judge.

George Carter, convicted of larceny, appeals. Reversed.

*Johnson & Chapman*, for the appellant.

*Monroe McClurg*, Attorney General, for the State.

TERRAL, J. George Carter was tried and convicted in the Circuit Court of Sunflower County of grand larceny, and was sentenced to the penitentiary for three years. He excepted to several rulings of the court in the admission of testimony and in the giving of instructions, but we find no error committed in that behalf. He also moved for a new trial, which was refused. One ground of the motion was that the jury had during the trial gone from the court room and into and across the public street to a house or office there situate, and during that time they were not under the supervision of any officer. Upon the hearing of the motion R. P. Miller testified that he was deputy sheriff, and was in the court room when the jury, or one of them, requested permission of the court to retire for a few minutes; that permission was given, and that the jury left the court room, and went some hundred yards across a public street to the water-closet, and that no officer went with them, so far as he knew. This is the substance of the record on this point, and it is claimed that it is insufficient to overcome the effect of the maxim, "*Omnia rite acta esse præsumuntur*." But we think the testi-

\*Upon all subjects, consult Table of Topics in this Volume and General Index in 10 Am. Crim. Rep.

mony of Miller shows that the jury were unattended by an officer while absent from the court room, and we suppose that, if the fact had been otherwise, the judge would have so certified in the bill of exceptions, as such matters are under his supervision. But, if the matter had passed from his recollection, it would have been an easy matter for the district attorney to have proven such attendance. We conclude the fact to be that the jury was absent from the court room for some minutes unattended by any officer of the court. It is said that the rule of the common law is, where the jurors depart from the bar, a bailiff must be sworn to attend them. A departure from this rule is an irregularity which vitiates the verdict, unless it be affirmatively shown that it is above suspicion. In this State the rule is modified in reference to misdemeanors and in civil cases, but it obtains in all its force in respect to felonies. The departure of the jury from the bar in this case unattended by an officer subjects it to a suspicion of improper influence, which was not removed, and the verdict cannot be upheld. Our court, in all the cases before it, has spoken with one voice in favor of this rule; the only one that can insure the purity of the verdict. *Hare v. State*, 4 How. 187; *Boles' Case*, 13 Smedes & M. 398; *Organ's Case*, 26 Miss. 78; *Prewitt v. State*, 65 Miss. 438, 4 South. 346; *Durr v. State*, 53 Miss. 425. In *Organ's Case* the separation of one juror from the superintendence of the bailiff was held to be an irregularity that vitiated the verdict. With stronger reason must the separation of all the jury from the superintendence of an officer have a like effect. Reversed and remanded.

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GAMBLE V. STATE.

44 Fla. 429—33 So. Rep. 471.

Decided October 7, 1902.

**TRIAL:** *Separation of, and use of intoxicants by, jurors—Presumptive as to prejudicial effect; and burden on State to remove.*

1. The mere separation of jurors, impaneled to try a capital case, from their fellows, without the attendance of an officer, although an irregularity, is not a sufficient cause for setting aside the verdict, if the court is satisfied that the prisoner has not sustained any injury from such separation. But where there has been an

improper separation during such trial, if the verdict is against the prisoner, he is entitled to the benefit of a presumption that the irregularity has been prejudicial to him, and the burden of proof is upon the prosecution to show to the entire satisfaction of the court that the prisoner has suffered no injury by reason of the separation. Contrary dicta in *State v. Madott*, 12 Fla. 151, disapproved.

2. If intoxicants be shown to have been used by the jury impaneled in a capital case, the presumption arises in favor of the convicted defendant that it resulted injuriously to him; and the burden is on the State to show affirmatively, to the entire satisfaction of the court, that their use was to such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant from its use by the jury, or any member of it.

(Syllabus by the Court.)

Error to Circuit Court, Dade County; Hon. Minor S. Jones, Judge.

David Gamble, convicted of murder, brings error. Affirmed.

*B. A. Thrasher*, for the plaintiff in error.

*William B. Lamar*, Attorney General, for the State.

TAYLOR, C. J. The plaintiff in error, David Gamble, was indicted, tried, convicted, and sentenced for the crime of murder in the first degree at the spring term, 1902, of the Circuit Court for Dade County, and comes here by writ of error.

The only question presented here is the propriety of the denial of the defendant's motion for new trial, upon the fifth and sixth grounds thereof, as follows:

"(5) Because the jury that was impaneled to try, and did try, this case, were not, during said trial and consideration of this case, so guarded or protected as the law requires, either by the sheriff or bailiff, as to prevent said jury or protect them from improper communications or instructions."

"(6) That the said jury were allowed during the trial of the case to separate and absent themselves from the presence of each other and from the presence of the bailiff, and individual members of the jury were allowed to talk and converse with other persons who were not members of the jury, said person or juror so conversing not being at the time in the presence of the members of the jury, or in the presence of the bailiff, sheriff, or other officer; that the place where said jury ate and slept during

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the time of the trial and consideration of this case was at the hotel known as the 'Everglade,' one of the leading hotels of the City of Miami, Dade County, and located several blocks from the court house; that much of the time was spent at and about said hotel, during which time various members of the jury would separate or absent themselves from the jury as a body, some being in the porch of the hotel, some in the hall, some in the toilet room, and some in the yard, during which time the said several members of the jury, or those who desired, could, and some did, converse with persons not members of the jury; that said jury at night occupied different rooms in said hotel, to wit, three rooms, there being four jurymen to each room."

In the case of *State v. Madoil*, 12 Fla. 151, which was a trial for larceny, it is said: "In trials for offenses punished capitally, where one or more of the jury separate from their fellows, we think it should be shown that the separation was from urgent necessity, and that no opportunity was offered for any improper or undue influence. In such cases the conduct of the absent juror should be subjected to the most rigid scrutiny, in order to ascertain if it was blameless while separated from his fellows; and the verdict should only be allowed to stand when the prosecution can show that there was no opportunity to tamper with the juror, or to influence him in finding his verdict." This rule, we think, indulges too strong a presumption against the integrity of the jurors, and is too favorable to the accused in such cases, as it makes the integrity of the verdict dependent solely upon the existence of an opportunity for an improper tampering with a juror, whether such opportunity was utilized, or not, by any one in any manner. Besides this, what was said in that case as to the rule governing the separation of jurors in capital cases was *obiter dicta*, as the court was not dealing with a capital case, but one of larceny only. In the case of *Bird v. State*, 18 Fla. 493, it is said that "where it is shown to the satisfaction of the court that there was no misconduct upon the part of the jurors, and it is so certified by the court in the bill of exceptions, the mere separation of the jury is not a sufficient ground for a new trial." The *Bird Case* was one for murder, and it recognizes the propriety of the rule that, even though there may be an opportunity for the exertion of improper influences upon the jurors, yet the

bare fact of such opportunity, without resultant harm to the accused, is not enough to avoid the verdict. The correct rule, as we think, deducible from these and other cases, is that the mere separation of jurors impaneled to try a capital case, from their fellows, without the attendance of an officer, although an irregularity, is not a sufficient cause for setting aside the verdict, if the court is satisfied that the prisoner has not sustained any injury from such separation. But where there has been an improper separation during such trial, if the verdict is against the prisoner, he is entitled to the benefit of a presumption that the irregularity has been prejudicial to him, and the burden of proof is upon the prosecution to show to the entire satisfaction of the court that the prisoner has suffered no injury by reason of the separation. See *State v. Cucuel*, 31 N. J. Law, 249.

The facts, in brief, disclosed by the examination of the jurors, bailiff, sheriff, and others, in this case, are, in substance, as follows: The jury, in charge of a bailiff, took their meals and slept at a hotel in the town of Miami, where the trial was had. They occupied three adjoining rooms on the upper floor of said hotel, and were the sole occupants of that floor; the bailiff in charge staying there with them. In passing to and fro between the court room and hotel they did not keep compactly together, but straggled somewhat, and such straggling also occurred while they were about the hotel; but on such occasions they were all in view of the bailiff. At the hotel some of them would loiter in the halls, and on one or two occasions while so loitering would speak a few words to some girls who were staying there. When they would come into the hotel from the court house, they would all repair to a small washroom of the hotel, too small to accommodate them all at once; and, as one batch of them would get through bathing, they would step outside and wait just outside the door, under a tree, until the others got through; the bailiff the while having all of them practically in his view. On one occasion one of the jurors got up from the dining table during meal time, and went upstairs alone to their rooms, for the purpose of getting his handkerchief, and remained away several minutes. The bailiff went after him, leaving the rest of the jury unattended at the dining table, but met him on the stairs, and returned immediately with him to the rest of the jury in



the dining room. On one occasion, at a late hour in the night, one of the jurors being sick, the bailiff and another juror got up and went out of the hotel, and into the town with him, and saw a doctor, and from the doctor went to a drug store, and immediately back to their rooms at the hotel; the rest of the jury being left meantime unattended and unconfined in their rooms at the hotel. On another occasion, while the jury, in a body, were walking past the barber shop of one of their number, they stopped while the owner of the shop went in and gave some business directions to his assistants in charge of the shop. The jury were also taken in body to the postoffice to get their mail, but none of them received any letters or other communications that had anything to do with the case. On one occasion an outside party was permitted by the bailiff, after exhibiting two telegrams to the bailiff, to show them to one of the jurors in the presence of the others. These telegrams were entirely foreign to the case on trial, and were from commission firms in two distant cities in other States, relative exclusively to the sale and shipment of tomatoes for the juror to whom the telegrams were shown.

While the motion for new trial was not based upon the use of intoxicants by the jury during the trial, yet it appeared from their examination that they procured and had in their rooms at the hotel ten or a dozen bottles of lager beer, a pint and half pint flasks of whisky, and a regular bottle of whisky, during the time of the trial. The proofs showed that of this they drank very sparingly and moderately; none of them being at any time the slightest bit intoxicated from its use; half of the full bottle of whisky being left unconsumed at the close of the trial. This liquor, it appears, was procured at the expense of the jurors themselves; they contributing money for its purchase. While these irregularities and separations on the part of the jury were shown by their own statements to have occurred, yet we think that it was also affirmatively and satisfactorily shown that nothing occurred from it to influence the verdict, and that no harm resulted therefrom to the defendant. It was affirmatively shown that, in all the separations of the jury, no communication in reference to the case was had between them and any outside

party, and that none of them heard anything tending to influence their verdict; that none of them conversed with any one in reference to the case; neither was anything said with reference to it in their hearing; and none of them received any communications from outside in reference to the case. The use of intoxicants by the jury was also affirmatively and satisfactorily shown to have been to such a limited and moderate extent as to leave no room for any supposition that harm resulted therefrom to the defendant. As to the use of intoxicating liquors by juries in capital trials, practically the same rule applies that appertains to separations by the jury in such cases. If intoxicants be shown to have been used by the jury, the presumption arises in favor of the convicted defendant that it resulted injuriously to him, and the burden is on the State to show affirmatively, to the entire satisfaction of the court, that its use was to such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant from its use by the jury, or any member of it. *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *Jones v. State*, 68 Ga. 760. The conduct of both the bailiff in charge of the jury in this case and of the jurors themselves was highly irregular, and unbecoming the proper and decorous conduct of the trial of a citizen for his life, for all of which misconduct on the part of the bailiff and the jurors they should, at least, have been severely reprimanded by the court, if not more severely dealt with; but, in consonance with the rule of law above announced, it having been affirmatively and satisfactorily shown, as we think, that no harm resulted to the defendant from such irregularities and misconduct on the part of the jury and the bailiff in charge, we cannot disturb the verdict found. This disposes of the only question presented either by the record or in the briefs of counsel, and, finding no reversible error, the judgment of the court below is hereby affirmed.

## STATE V. SALVERSON.

87 Minn. 40—91 N. W. Rep. 1.

Decided June 27, 1902.

TRIAL: \* *Larceny—Evidence—Separation of jury—Use of intoxicating liquor by juror—Presumed prejudicial—Discretion of trial court—Practice.*

1. In a criminal prosecution of a bank cashier on the charge of grand larceny in the first degree, based upon his alleged wrongful and unlawful appropriation of the sum of \$925, funds of the bank, the evidence is examined, and held sufficient to sustain a conviction.
2. *State v. Clements*, 85 N. W. Rep. 229, 82 Minn. 434, holding, in effect, that, where books of account material to an issue on trial, are properly received in evidence, and before the court and parties subject to inspection, and requiring an examination for details of information contained therein, it is proper to receive balances and summaries thereof from an expert witness, who has made the same, followed and applied.
3. Whether a sufficient foundation has been laid for the introduction of parol evidence of the existence and contents of a written document rests in the sound discretion of the trial court, and its decision permitting such evidence is reviewable on appeal only in case of an abuse of discretion.
4. It was not reversible error in this case for the trial court, over defendant's objection, to permit the jury to separate for the period of four hours immediately after the taking of evidence had been concluded and before the case was argued and submitted to them by counsel, it appearing that the jury had been permitted to separate at other temporary adjournments of the court during the trial, and it not appearing that defendant was in any way injuriously affected thereby. The matter was within the discretion of the court.
5. The use of intoxicating liquor by a juror while engaged in the trial of an action is highly reprehensible, and when his indulgence is to such an extent as to impair his faculties, and render him incapable of comprehending or appreciating the proceedings in court, or unfit him for an intelligent, fair, and impartial consideration of the case, when not participated in, assented to, or waived by the parties, constitutes such misconduct as vitiates and invalidates the verdict, unless it be made to appear clearly that no prejudice resulted therefrom.
6. The showing that a juror was intoxicated on the trial of an action to the extent above stated raises a presumption of prejudice, and the burden is upon the prevailing party to overcome and rebut it; but whether the presumption is overcome in any case is very largely a question for the trial court to determine, requiring a clear showing to justify a reversal by the Supreme Court.

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\*Upon all subjects, consult Table of Topics in this Volume and General Index in 10 Am. Crim. Rep.

7. If the party against whom a verdict is returned be instrumental in causing the intoxication of the juror, or be aware of the fact before the verdict, and fails to bring it to the attention of the trial court, he waives the misconduct. An essential of an application for a new trial based upon this ground is an affirmative showing that the moving party had no notice of the misconduct before verdict.
8. Whether a new trial should be granted for misconduct of a juror of this nature rests in the sound judicial discretion of the trial judge, and his determination thereof is not reviewable except in a clear case of abuse of discretion.
9. Various assignments of error considered, and held to present no reversible error.

(Syllabus by the Court.)

Appeal from District Court, Swift County; Hon. G. E. Qvale, Judge.

B. K. Salverson was convicted of grand larceny, and he appeals. Affirmed.

*James A. Peterson, J. O. Haugland and C. L. Kane, for appellant.*

*Wallace B. Douglas, Attorney General, F. P. Olney, County Attorney, and E. T. Young, Assistant County Attorney, for the State.*

BROWN, J. Defendant was indicted, tried, and convicted in the District Court of Swift County of the crime of grand larceny in the first degree, and appeals from an order denying his motion for a new trial.

It appears from the record before us that defendant was the cashier of the Citizens' Bank of Appleton, this State, a corporation created for the purpose of doing a general banking business, with full charge and control of its affairs. On the 16th day of January, 1899, the bank was the owner of eighty acres of land, and defendant, as its cashier and representative, sold the same to one Avelsgaard, receiving in payment therefor a deed to the bank of forty acres of other land and Avelsgaard's promissory note for the sum of \$925, payable to the bank. Defendant falsely entered this note and the transaction evidenced by it upon the books of the bank as a loan of the amount of money represented thereby, and the contention of the State is that he then wrongfully took from the funds of the bank that

amount, and unlawfully appropriated it to his own use. The entry so made by defendant in the books was subsequently carried thereon as a loan, and was at no time corrected, or made to show the true conditions. A large number of errors are assigned; the greater proportion of which, however, require no special mention, and we shall refer to some of the main questions only.

1. Some time after Avelsgaard had made and delivered his note to the bank in payment for the land sold him by defendant, he paid the same, and it was returned to him. It was not produced at the trial, and the court admitted parol proof of its existence and contents; and of this defendant complains because, and for the reason, as urged by his counsel, that no proper foundation was laid. Avelsgaard testified that he had made diligent search for the note; that he had looked carefully in all places at his home in which he kept papers of the kind, but was unable to find it. He further testified that he thought the note was still at his home somewhere; just where he could not tell. The examination touching this particular question was somewhat extended by both parties, the court finally ruling that a foundation was sufficiently laid, and admitted the testimony as to the contents of the note. The question whether a proper foundation was laid for the admission of this evidence was one resting very largely to the sound discretion of the trial court, and, it not appearing to have been abused, there was no error in the admission of the evidence. *Insurance Co. v. Taylor*, 5 Minn. 492 (Gil. 393); *Molm v. Barton*, 27 Minn. 530, 8 N. W. Rep. 765. And, moreover, when the defendant was called as a witness in his own behalf, he admitted the execution and delivery of the note, and undertook to explain his conduct in reference to it and the entries made in the books of the bank. So it became a conceded fact in the case that the note was given as claimed by the State, and its precise terms were not material upon any question in issue.

2. The books of the bank were offered in evidence, and Public Examiner Pope was permitted, over defendant's objection, to testify as a witness on the part of the State, the object and purpose of keeping such books, and that they were kept in accordance with regulations prescribed by him for all the banks

of the State. He was also permitted to testify, as an expert, the result of his computations and summaries from the books, and that they did not disclose that the sum of \$925, which defendant entered therein as a loan, and which appeared therefrom to have been taken from the funds of the bank, was ever returned. There was no error in the rulings of the court on this subject. It was said in *State v. Clements*, 82 Minn. 434, 85 N. W. Rep. 229,—a case involving a very similar question,—that where books of account, material to an issue on trial, are properly received in evidence, and being in court, open to inspection by all parties, and which require an examination for details of information contained therein, it is proper to receive balances or summaries from an expert witness, who has made the same, upon proper foundation being laid. There is and can be no serious controversy in the case at bar but that the books were properly received in evidence. That they were the books of the bank is clear. They were turned over by defendant himself to the receiver of the bank as its books, and all the entries contained therein had exclusive reference to the business and affairs of the corporation. Witness Pope was called as an expert, a proper foundation was laid, and he was shown to be fully qualified to testify concerning the subject in hand. He was permitted to testify that all the transactions of the bank were entered in the books, and of this defendant complains. It is very usual on the part of banking corporations to enter all their business transactions in their books, though it is not clear that it was strictly proper to allow the witness to state that all those of this bank were so entered. He did not keep the books, and could speak only from his knowledge of the general custom in that particular. But, whether competent or not, the evidence on this subject in no way prejudiced defendant. No claim is made that all the transactions of the bank were not entered in the books, and the only entries which were material as affirmative evidence against defendant were made by himself. All the testimony of this witness was based upon what the books disclosed. He was asked what amount of money was taken from the assets of the bank on account of the Avelsgaard and one other note, and he answered \$966, "according to the books." He did not, as contended by counsel, undertake to speak from

personal knowledge. If his answer was inaccurate, the books were before the court, open to inspection, and he could have been corrected. It is quite true that the books should speak for themselves, but under the rule announced in the *Clements Case*, which is in accord with the authorities generally, it was not error to permit the witness to testify therefrom in the respects complained of by the assignments of error covering this subject.

3. The taking of testimony on the trial was concluded at about 12 o'clock noon, May 30th, Memorial Day. At this time an attorney not connected with the trial of the case requested the court to take a recess until 4 o'clock in the afternoon, to enable the attorneys, and others in attendance at court, to take part in the public observance of the day. The usual time for the noon recess was from 12 to 2 o'clock, and the request was that it be extended two hours. To this counsel for defendant objected, and insisted that the trial be proceeded with at the usual hour; the objection being founded on the theory that, as the evidence had all been presented to the jury, it would be improper to permit them to separate before the final submission of the case. The court overruled the objection, and took a recess until 4 o'clock; but before doing so inquired of counsel for defendant whether they desired the jury kept together during the recess, and they replied that they had no request to make on that subject. It is now urged that the action of the trial court was very unfair, and operated prejudicially to the rights of the accused. We are unable to concur in this contention. The jurors had been permitted during the entire trial to separate during the temporary adjournments of the court, and were kept under no restraint whatever; and it is not fair to suppose or presume that their separation during the last day of the trial would be any more prejudicial to defendant than their separation on preceding days. The matter of adjournment of court to permit court officers and others to participate in the Memorial Day exercises was clearly within the discretion of the trial judge, and we find no reason for holding that it was abused. The inquiry of the court whether counsel for defendant desired the jury kept together during the recess was in no way prejudicial.

4. It is contended in behalf of defendant that the evidence is wholly insufficient to show defendant's guilt beyond a reason-



able doubt, and that the verdict of the jury should be set aside, and a new trial granted. As we have already stated, defendant was the cashier of the bank, in full charge and control of its affairs, including its books and records, and was alone responsible for the daily conduct of its business. He sold a tract of land belonging to the bank, receiving in part payment the Avelsgaard note for \$925, which, instead of entering upon the books as an asset of the bank, he deliberately and intentionally recorded as a loan, thus representing that he had loaned that amount of money for the bank, when in truth and in fact he had not. The inferences to be drawn from his conduct in this matter, including the entry made by him in the books, and all attending circumstances, were for the jury to draw. It is claimed that he indorsed the amount of this note upon another note held by the bank against a third person, the payment of which was secured by a chattel mortgage. Whether this indorsement was made at the time, and for what purpose, were questions of fact for the consideration of the jury, and not for the court. The evidence is amply sufficient to sustain the jury in finding that the funds of the bank were short at the close of business on the day of this transaction to the amount represented by the Avelsgaard note, and that the amount of the shortage was appropriated by defendant. The books were made by defendant to appear that the amount had been loaned, and the manifest deduction from them was that it had been taken from the bank's funds on that day. It is urged that the bookkeeper employed at the bank as an assistant to defendant was not friendly disposed towards him, and the inference is sought to be drawn that he, and not the defendant, appropriated the money. But there is no claim that the books were manipulated to the prejudice of defendant. Reliance was made for conviction upon entries made by him, and not by the clerk, and the latter does not appear to have had anything to do with this transaction. A book kept mainly by the clerk, and designated by witnesses as the "teller's cash book," disclosed that there was a surplus in the hands of the bank at the close of business hours on the day in question to the amount of something like \$2,700, and it is very strenuously contended by appellant's counsel that this fact is conclusive that no money at all was taken by defendant, or any other person, at that time.

The jury were justified in finding from the evidence that this book was not one of the regular books kept by the bank, and that it was wholly inaccurate and unreliable; and they were justified in finding, too, that there was not, as a matter of fact, a surplus of funds as disclosed by that book. Defendant, as a witness in his own behalf, explicitly denied that he wrongfully or otherwise appropriated any money of the bank at this time; but whether he did or not was clearly a question for the jury to determine, and the result of our examination of the evidence is that their verdict is sustained, and cannot be disturbed. The witnesses were before the trial judge, who had opportunity to observe their demeanor and credibility, and his approval of the verdict has great weight with this court in the consideration of this branch of the case. From a very painstaking examination of the whole evidence, there remains no reasonable doubt in our minds as to the guilt of defendant.

5. The question we deem the most serious and important is in reference to the alleged misconduct of one of the jurors. It appears from the record and affidavits in support of the motion for a new trial that during the recess of the court for the Memorial Day exercises one of the jurors became somewhat intoxicated, and appeared in that condition at the opening of court at 4 o'clock. It is contended that this was gross misconduct on the part of the juror, and such as to vitiate the verdict and require a new trial. The authorities very generally hold that conduct of this kind on the part of a juror selected to try and determine the issues presented in any case invalidates the verdict, when the intoxication is to such an extent as to deprive him of the free and full exercise of his mental faculties. An examination of some of the earlier cases shows a very strict adherence to that doctrine, though by modern authorities it is much relaxed. The correct rule, as voiced by the later decisions, may be stated, speaking generally, that the use of intoxicants by a juror while engaged in the trial of an action, to such an extent as to render him incapable of appreciating and comprehending the proceedings in court, and unfit for an intelligent, fair, and impartial performance of his duties, when not participated in, assented to, or waived by the parties, vitiates the verdict. Litigants are entitled to a trial by a jury of competent men, and when any one

or more of them so far forgets the importance of his station and the responsibilities imposed upon him as to render himself unfit, by the use of intoxicating liquors, to intelligently hear and determine questions presented to him for consideration, the verdict rendered is invalid, and the courts uniformly vacate and set them aside, unless the conduct is waived by the parties, or it be made to appear that no prejudice resulted therefrom. *Brown v. State*, 137 Ind. 240, 36 N. E. 1108, 45 Am. St. Rep. 180; *Green v. State*, 59 Miss. 501; *State v. Jenkins*, 116 N. C. 972, 20 S. E. 1021; *State v. Demarest*, 41 La. Ann. 413, 6 South. 654. The courts have not attempted, however, by judicial decisions, to impose an absolute restraint in respect to indulgence in intoxicants; and it is only in cases where jurors have become so intoxicated as to render themselves incapable of comprehending the proceedings in court that their verdicts are set aside; and not then if the conduct of the juror in that respect be known to the parties, and they fail and neglect to call the attention of the court to the fact; nor when it is made to satisfactorily appear that no prejudice in fact resulted therefrom. Ordinarily, a showing that a juror was intoxicated during the progress of the trial raises an inference or presumption of prejudice (*State v. Madigan*, 57 Minn. 425, 59 N. W. 490), and the burden is upon the successful party to rebut it by a showing that none in fact resulted. If a party have knowledge of the misconduct, it is his duty to call the attention of the court to the matter that the juror may either be discharged from the case or placed in the hands of an officer until he shall become sober enough to proceed with his duties. The orderly conduct of a trial does not require that attention be called to the fact in open court. Every purpose may be answered, and every right protected and preserved, by privately informing the presiding judge. Whatever variance there may be in the authorities as to when such conduct renders a new trial absolutely necessary, they are very uniform in holding parties to a reasonably strict observance of this rule; not, perhaps, to the same degree in criminal prosecutions as in civil actions but it is generally held that a defendant cannot, either in a civil or criminal action, take advantage of the misconduct of a juror after a verdict has been rendered against him when he had knowledge of the misconduct before the conclusion of the trial,

and failed to make proper complaint to the court. *Cogswell v. State*, 49 Ga. 103; *Harris v. State*, 61 Miss. 304; *People v. Deegan*, 88 Cal. 602, 26 Pac. 500; *Grottkau v. State*, 70 Wis. 462, 36 N. W. 31; *Mergentheim v. State* (Ind. Sup.) 8 N. E. 568. This general rule applies to misconduct on the part of jurors of every kind or character. And, further, the question whether a party was prejudiced by any such misconduct is addressed to the sound discretion and judgment of the trial court, and its determination of the question is subject to review on appeal only in case of its clear abuse. As stated in *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680, the granting of a new trial for misconduct of a juror rests in the sound discretion of the trial court, and requires a clear case of abuse to justify a reversal by this court. See, also, *Svenson v. Railway Co.*, 68 Minn. 14, 70 N. W. 795; *Coal Co. v. Hutchinson*, 36 N. J. Law, 24; *Austin v. State*, 42 Tex. 355; *Commonwealth v. White*, 148 Mass. 429, 19 N. E. 222; *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684; *State v. Taylor*, 134 Mo. 109, 35 S. W. 92. The same rule applies to an order refusing a new trial.

From these rules and principles of the law it follows that it was incumbent upon defendant, in order to justify the trial court in granting him a new trial on this ground, to establish affirmatively to the satisfaction of that court: (1) That the juror was, during the trial of the action, so intoxicated from the use of liquors as to impair his faculties, and to render him for the time being unfit for service; and (2) that he was unaware of that condition of the juror until after the verdict, and did not participate in bringing the same about. And the question for this court to determine is whether, upon the showing made in that behalf, the trial court abused its discretion in denying his motion. That the juror complained of in the case at bar was, in a measure, at least, intoxicated during the time counsel for the State was presenting the case to the jury, and for a short portion of the time defendant's counsel was presenting his case, is made reasonably apparent by the affidavits in support of the motion for a new trial. The extent of the intoxication is not so clear. The juror himself admitted that he drank intoxicating liquor during the recess of the court; that he was in the habit of drinking such liquors; but that he was not drunk, and was able

to comprehend all that took place in court, he expressly asserts, though he concedes that he was somewhat drowsy during the argument of the county attorney. So his intoxication to some extent may be conceded, though, after the recess of the court at 6 o'clock, when the court reconvened at half past 7, the juror had fully recovered from the effects of his indulgence, and took an active part in all that transpired subsequent to that hour. To establish the fact that he was unaware of the condition of the juror, defendant presented the affidavits of his attorneys. Two of the attorneys—Messrs. Peterson and Haugland—stated in their affidavits that they were not aware and had no knowledge of the juror's misconduct before the verdict was rendered. The third attorney stated that he "had no positive or conclusive knowledge that said juror was under the influence of liquor," nor did he know that the juror had been drinking intoxicating liquor while acting as a juror in said action, until after the verdict. This affidavit is clearly evasive. Whether the attorney had "positive" or "conclusive" knowledge is not the test. If he had any knowledge or notice at all of the intoxication of the juror it was his duty to call the attention of the court to the fact. Defendant himself made no affidavit as to whether he had any information on this subject before the verdict, but this fact should not militate against him. He was represented by his counsel, and, in the nature of things, relied wholly upon them for the proper conduct of his defense. If it had been made to appear unequivocally that each and all of his attorneys were without knowledge of the misconduct of the juror before the verdict, the absence of a showing on his part in that particular would not be conclusive against him; though we do not wish to be understood as holding by this statement that the circumstances of a particular case might not be such as to require a personal showing by the party, as well as by his attorneys. Whether the showing made in the case at bar was sufficient under all the circumstances of the case, the extent of the intoxication, and whether the presumption of prejudice arising therefrom was overcome and rebutted, were for the trial court to determine. As already suggested, these questions were addressed to the sound discretion and judgment of that court, to be interfered with only upon a clear showing of an abuse of that judicial function. After a very serious considera-

tion of this feature of the case, we are unable to say that there was such an abuse of discretion as to justify a reversal of the order appealed from. The position of the trial judge placed him in a much better position than this court to determine the effect of the conduct complained of, and his well-known judicial probity and fairness precludes the suggestion that he acted otherwise than impartially. He found from the affidavits presented on the hearing before him that defendant's counsel had notice of the conduct of the juror before verdict, and his determination of that question is final. *State v. Madigan*, 66 Minn. 12, 68 N. W. 179. We do not wish to be understood as approving in the slightest degree conduct of this character on the part of jurors. It is highly reprehensible, and calls for the prompt and effective action of the trial court when attention is called to it. When a person is placed upon his trial for a crime, which may, if he be found guilty, require his imprisonment, he is entitled to an orderly, dignified trial, conducted by a court and jurors possessing their faculties, and having due regard for the grave responsibility resting upon them; and when jurors, by an indulgence in intoxicating liquors, so impair their faculties as to unfit themselves for intelligent service, it is the duty of a trial court to set their verdict aside, guided in the performance of that duty by the rules and principles we have adverted to in this opinion.

A number of assignments of error are made in respect to the rulings of the trial court on the subject of the admission and rejection of testimony and in reference to the charge of the jury. We have examined all the assignments with care, and find no error of a prejudicial nature. The charge of the learned trial court was very full and explicit, stating clearly to the jury the law bearing upon every question in the case. It was fair and impartial, and covered every question the defendant had any right to insist should go to them.

Order affirmed.

## STATE v. NED.

105 La. 696—30 So. Rep. 126—54 L. R. A. 933.

Decided June 3, 1901.

*TRIAL: \* Intoxicated juror—Construction of statute.*

The conviction of a person of a crime, which the Constitution requires should be tried by a jury of twelve, though nine jurors concurring might render a verdict (article 116, Const. 1898), is not a legal conviction, though twelve jurors were physically present during the trial, and all concurred in a verdict of guilty, if one of the jurors on the jury was in a drunken condition during the trial.

(Syllabus by the Court.)

Appeal from Judicial District Court, Parish of St. Landry;  
Hon. Edward T. Lewis, Judge.

Jean Baptiste Ned, convicted of crime, appeals. Reversed.

*John W. Lewis* and *James J. Bailey*, for the appellant.

*R. Lee Garland*, District Attorney, for the State.

NICHOLLS, C. J. The defendant appeals from a sentence of seven years' imprisonment at hard labor in the penitentiary. The crime of which he was convicted was one requiring for conviction, under the Constitution, "a trial" by a jury of twelve. Article 116, Const. 1898. The court overruled his motion for a new trial, which assigned as the ground therefor that "one of the jurors, Lastie L. Harmon, who after the panel had been completed, and the trial gone into, and the court reconvened pursuant to adjournment, appeared in court in a drunken condition; that when the first witness after the recess hour was called on, and before his testimony was given, the said juror, because of his drunken condition, had to be removed to an adjoining room; that when he reappeared in court and resumed his seat among his fellow jurors he was still in an intoxicated condition, unable to hear, follow, and understand the testimony, and immediately fell asleep, and remained in that condition during the remainder of the trial, and had to be awakened by one of the jurors when the judge ordered the jury to their chamber for deliberation;

\*Upon all subjects, consult Table of Topics in this Volume and General Index in 10 Am. Crim. Rep.



that the juror remained asleep during the entire time that the different witnesses were testifying, during the argument of counsel, and the charge of the judge." The judge refused the new trial, assigning as his reason "that, under article 116 of the Constitution, in cases of this character, though a jury of twelve is required, nine of the jurors can find a verdict, and the misconduct of one member of the jury does not render the finding of the nine concurring members invalid, unless it be shown that said juror was one of the nine rendering the verdict; that the record in the case failed to show any dissenting juror, and the reason for setting aside the verdict of jurors under the old rule of unanimity does not exist in this case, and, in the opinion of the court, should not be applied, especially in view of the consideration that no injury either appears or has been shown to the accused; the misconduct of the juror was not of such a nature as to have any appreciable influence on the other members in arriving at a just verdict, as the law permitted the remaining jurors to render a legal verdict." The attorney general has filed no brief in the case. In that of the district attorney he says: "The evidence taken on the trial of the motion for a new trial we must admit establishes the fact that the juror was to a certain extent *hors de combat*, so that there can be no dispute between the State and the defense as to the facts governing the trial of the motion narrowing the contention to a question of law, to wit, whether, since the adoption of the Constitution of 1898, misconduct on the part of one member of the jury will vitiate a verdict rendered in a case where under the Constitution nine concurring can render a verdict, unless similar charges of misconduct can be leveled against his fellows."

Neither the judge nor the district attorney should have permitted the trial to proceed under the conditions existing. The spectacle of a man on trial for a crime involving his liberty, with a drunken juror in the jury box, is not one calculated to advance the proper administration of justice, nor to inspire the people with the respect which should be due to courts.

Independently of this, the conclusions of law reached by the court and the district attorney were not well grounded. The duty of a jury is not simply to hear the evidence adduced upon a trial, but, on retiring to their room, to deliberate upon it. The

Constitution required that in this case the accused should be tried by twelve men. He could not waive this requirement. He was entitled to the deliberation, consultation, and decision of twelve men. This he has not had. Had a jury of twelve been impaneled for the trial of this cause, and, one or two of the jurymen absenting themselves, the trial had been proceeded with, with nine or ten or eleven jurors, it could not be claimed that the Constitutional requirement that the accused should be tried by a jury of twelve had been complied with. We understand the Constitution to require, not simply that nine jurors should concur in a verdict, but that twelve must be present from the beginning of the trial to the end. The juror in this case was physically present, but for legal purposes he might well have been absent. We do not intimate that every act of misconduct by a single juror would carry with it the avoidance of the verdict rendered by the jury, but misconduct, such as has been shown in this case, should carry, and does carry, with it that result. For the reasons assigned herein, it is ordered, adjudged, and decreed that the verdict of the jury, and the judgment thereon rendered, be, and the same is hereby, set aside, and the cause remanded to the District Court for further proceedings according to law.

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### HEMPTON v. STATE.

111 Wis. 127—86 N. W. Rep. 596.

Decided June 20, 1901.

**TRIAL: INSANITY: PRACTICE: Proof and presumptions as to insanity—Non-expert witness—Right of cross-examination—Remarks of judge—Separation of jury—Misconduct of jurors—Affidavits of jurors to impeach the verdict.**

1. On the trial of the issue of insanity in a prosecution for a criminal homicide, it is proper to show on the part of the accused that he was adjudged insane and committed to the State hospital at a time previous to the homicide, and the facts on which the adjudication took place, and to that end to introduce in evidence the reports of the examining physicians.
2. The daily record of a patient at the hospital for the insane, required to be kept by section 561g, Revised Statutes of 1898, is ad-

missible in evidence to show the mental characteristics of the patient while at the hospital in any judicial proceedings where the facts in that regard are material, under the general rule that a public record required to be kept for public purposes is admissible in a judicial proceeding where such matters are material.

3. Insanity is provable by circumstantial evidence mainly, all the acts and mental characteristics of the person whose sanity is in question, covering a considerable period of time prior to the particular time in question and thereafter as well, being material.
4. The verdict of the jury, on the special issue as to the sanity of a person charged with a criminal offense at the time of the alleged commission thereof, that he was sane, precludes further inquiry as to mental impairment at such time, entirely exusing the accused from legal responsibility; but on the plea of not guilty, evidence is permissible tending to show a condition of mind—whether produced by the use of intoxicating liquor or any other cause—rendering the accused incapable of forming a specific intent to commit the crime of murder at the time of the alleged offense, and bearing on the character of the offense if he is guilty at all.
5. On the question of whether, because of an abnormal mental condition, the accused, in a prosecution for criminal homicide, was capable of forming a design to kill, a material issuable question arises involving mental condition, which may be evidenced by proof of the use of intoxicating liquors or by any other adequate disturbing cause.
6. The right of reasonable cross-examination by leading questions is absolute. The denial of it is the denial of a valuable right, and, if prejudicial, constitutes reversible error.
7. A non-expert witness may give opinion evidence as to the mental condition of a person if he is shown to have knowledge of facts regarding such person reasonably sufficient in the judgment of the court to enable him to form an opinion.
8. On the question of the competency of a non-expert witness to testify under the foregoing rule, the decision of the court, if it does not transcend the bounds of reason, is conclusive.
9. Under the statutes of this State, after a person has been on parole continuously from the hospital for the insane for the period of two years or more, the adjudication upon which he was committed to the hospital is no longer *prima facie* proof of insanity.
10. The rule, independent of the statute, that a person adjudged insane continues so till the contrary is shown, is a rule of evidence, subject to reasonable change by legislative will. It does not apply to insanity other than that of a nature liable to be permanent.
11. Upon the trial of a person for murder, where the question of whether the accused caused the death of the deceased is disputed, it is error, though not necessarily reversible error, for the court to use language in instructions to the jury or in remarks upon the trial indicating that the accused took the life of the deceased.
12. While the court, in a prosecution for murder, should submit the case to the jury for consideration upon every phase of criminal

homicide which the evidence in any reasonable view of it suggests, if the submission is made of one or more of the higher degrees of criminal homicide so that the jury will understand that if a verdict of guilty be not found as to one of them a verdict of not guilty should be rendered, a failure to submit lesser degrees of homicidal offense is not reversible error, though the better practice is to scrutinize the evidence with the greatest care and to resolve all reasonable doubts as to whether the evidence points to a particular degree of criminal homicide or not in favor of submitting such degree to the jury, and to submit the same whether it be requested on the part of the accused or not.

13. Evidence of voluntary intoxication of a person accused of the crime of murder has no significance as to murder in the first degree, unless the intoxication be such as to satisfy the jury that the accused, at the time of the homicide, was incapable of forming a deliberate intent to take the life of the deceased.
14. The separation of the jury in a capital case is fatal to a conviction unless the court shall be satisfied, by evidence produced, that it was not followed by any misconduct on their part, or by any circumstance calculated to exert an improper influence upon the verdict.
15. From the mere fact of the separation of a jury in a capital case contrary to the rule above indicated, a presumption of prejudice of the accused arises, and such presumption cannot be satisfactorily overcome by the affidavits of the jurors themselves and the officers sworn to attend them that they were not prejudicially affected by the separation or by anything that occurred during the time of such separation.
16. The conduct of jurors while outside of the court room, impeaching their verdict, may be shown by their own affidavits.  
(Syllabus by the Court.)

Error to Circuit Court, Manitowoc County; Hon. Michael Kirwan, Judge.

James L. Hempton, convicted of murder in the first degree, brings error. Reversed.

On July 27, 1898, about 5 o'clock p. m., Elizabeth Hempton, the wife of plaintiff in error, was shot through the head and instantly killed in the home occupied by him. For some time before such occurrence the deceased and her husband had not lived happily together. She commenced a suit against him for divorce, which was discontinued, and the parties resumed living together. About one year thereafter, and shortly before the alleged homicide, she again left her husband and commenced an action for divorce. At the time of the occurrence in question Hempton was engaged in the business of draying and main-

tained a home, his sister being his housekeeper. At such time, while Hempton was away at his work, his wife visited his home and took therefrom some things which she claimed were hers. About noon of the same day she made a second visit to the house and took away some things, Hempton being home on such occasion. He then told his wife to come the next day for the balance of her things. During the afternoon, in his absence, she made several visits to the house. Hempton returned home between 4 and 5 o'clock p. m. and directed his daughter, a girl then about ten years of age, to go to a neighbor's near by to request her mother, who was there, to come to his house. The girl did as directed and Mrs. Hempton promptly complied with the invitation. While the girl was gone upon such errand Hempton walked the floor of the kitchen. When Mrs. Hempton arrived the two went into the front room of the house, there being a sitting room between such room and the kitchen. The sister remained in the kitchen. The little girl was outside the house. Angry words were soon heard to pass between Hempton and his wife. She stamped her foot and gave the lie to her husband when immediately a revolver was discharged twice in the room. Almost immediately thereafter Hempton returned to the kitchen with a revolver in his hands. The little girl saw her mother in the front room soon after the first shot was fired, lying on the floor apparently unconscious, and saw her father turn the revolver upon himself and discharge it. Soon after such occurrence, officers of the law visited the house where they found the dead body of Mrs. Hempton on a chair in the kitchen, also found some bedclothes and a pillow covered with blood in the front room, and a revolver, stained with blood, lying on the bureau in the bedroom, two of the chambers thereof being empty. They arrested the plaintiff in error. He had a wound on the right temple and one back of and a little above the ear on that side of his head, both apparently caused by a bullet fired from behind. A bullet entered Mrs. Hempton's head on the right side just in front of and above the ear, passed through the skull and lodged in the scalp directly above the ear on the left side of the head. The side of her head where the bullet entered was powder burned. The day after the alleged homicide Hempton said that he thought he would scare his wife and that he guessed he

scared her more than he intended. He was placed on trial on the charge of murder in the first degree. The theory of the State was that he deliberately shot his wife and then turned the revolver upon himself and inflicted the wounds on his head that have been mentioned. The theory of the defense was that Hempton was insane and irresponsible at the time of the alleged homicide, that the shooting of his wife was accidental, or that, if he did the deed and was criminally responsible therefor, he was guilty of some offense less than murder in the first degree because of his mind being in such a condition from partial insanity, or from drunkenness, or from uncontrollable passion at the time of the occurrence, that there was no premeditated design on his part to kill his wife. There was a special plea of insanity and a plea of not guilty. The verdicts upon both issues were against the accused, he being found guilty of the highest offense of criminal homicide. Sentence was passed accordingly. Exceptions were taken to rulings of the court during the progress of and subsequent to the trial, which are considered in the opinion.

*G. G. Sedgwick*, for the plaintiff in error.

*E. R. Hicks*, Attorney General, for the State.

MARSHALL, J. (after stating the facts). Many propositions are presented for consideration in the brief of counsel for plaintiff in error, some of which are not considered of sufficient consequence to call for special mention in this opinion, though each, it is believed, has been considered with all the care which in any view of the case the same requires in order to do justice to the accused.

Evidence was given on the special issue to the effect that the accused was duly adjudged insane in January, 1884, and committed to the Northern Hospital for such unfortunates and that he was discharged therefrom in March, 1885. Proof was also made that in September, 1885, he was again duly adjudged insane and was thereupon committed as before, and that in December, 1885, he was again discharged on parole. On the trial of such issue the reports of the examining physicians in the judicial proceedings which resulted in the commitments

mentioned, and the daily record of the accused while he was at the hospital, kept in accordance with the statute (section 561q, Rev. St. 1898), were offered in evidence, generally, and were excluded so far as they showed the mental characteristics of the accused at the times referred to therein, or anything other than the facts as regards his having been twice adjudged insane, committed accordingly, and discharged as before indicated. The adjudications were not conclusive in favor of the accused except that he was insane when they were made, but the nature of his insanity at that time was proper to be shown in connection with all the circumstances of his life indicating his mental characteristics. The adjudications, without the grounds upon which they were made, so far as explaining the condition of the accused long after the presumption of insanity arising therefrom ceased, were of little value. The records kept at the hospital, by a rule of evidence too familiar to require discussion, were competent evidence of the facts which they purported to show. All public records which are by law required to be kept for the purpose of preserving evidence of transactions and occurrences for public uses, are competent to establish such transactions or occurrences when they are material in a judicial proceeding. *O'Mally v. McGinn*, 53 Wis. 353, 10 N. W. 515; *Jackson v. Astor*, 1 Min. 137, 39 Am. Dec. 281; *Thornton v. Campton*, 18 N. H. 20; 1 Greenl. Ev. 483; *Jones* Ev. § 520; *Steph.* Ev. art. 34. In *Inhabitants of Townsend v. Inhabitants of Pepperell*, 99 Mass. 40, the record of the condition and treatment of a patient at a public hospital for the insane, produced as evidence of the facts therein referred to, was held admissible on the issue of insanity when the same was produced forty years after it was made. That the facts referred to in the records under consideration were proper, there can be no question. Insanity is rarely susceptible of proof by direct evidence. Circumstances and acts of the subject, extending over a considerable period of time, are generally considered material. It is by such means almost invariably that insanity is established. 2 Greenl. Ev. § 371. Whether the exclusion of the evidence was sufficiently prejudicial, in view of other evidence in the case, to work a reversal, we need not decide, as there are other questions to be hereafter considered that are decisive of the case.



Evidence was offered, on the issue raised by the plea of not guilty, as to the mental characteristics of the accused, for the purpose of showing that he was afflicted with a disordered mind, not amounting to insanity in the legal sense, but of such a character as to be entitled to consideration on the question of the degree of the offense of criminal homicide, of which he was guilty, if guilty of any. The court ruled that the verdict on the special issue was conclusive as to every phase of insanity, and that no evidence of the mental condition of the accused at the time of or before the commission of the alleged offense was admissible except that which existed at the time of the offense, caused by intoxicating liquor. No doubt the statute permitting the special plea of insanity to be interposed with the plea of not guilty, and the trial of the issue upon the special plea to take place first, and requiring the jury, in deciding it, to render a verdict of not guilty if satisfied that the accused was insane, in the legal sense, at the time of the commission of the alleged offense, or they entertain a reasonable doubt on the question, contemplates an entire separation of that subject from the issue raised by the plea of not guilty, and that the trial and final disposition of the special issue by the verdict shall preclude any further inquiry in respect thereto. But that goes only to the question of legal insanity, excusing the accused from all responsibility for his acts; not to that lesser degree of disordered intellect rendering a person incapable of forming a design to kill, and bearing on the grade of his criminality. The learned trial court erred in ruling that no abnormal mental condition was material upon the general issue of not guilty, other than that produced and existing at the time of the alleged homicide, by the use of intoxicating liquor. The same rule that permits proof of intoxication as bearing on the question of malice, permits evidence of a disordered mental condition, however produced. The important circumstance is the disordered intellect, not the means by which it was produced. *Anderson v. State*, 43 Conn. 514, 21 Am. Rep. 669; *Hopt v. People*, 104 U. S. 631, 26 L. Ed. 873; *Terrill v. State*, 74 Wis. 278, 42 N. W. 243. In *Terrill v. State* this court passed upon this very question, saying, in effect, that drunkenness, together with other causes affecting the mind, is proper for the consideration of the jury in determining the grade of the offense in a

prosecution for murder. The rule was stated by quoting with approval from the opinion of Mr. Justice Gray in *Hopt v. People, supra*, thus: "When a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury."

Ella Hempton, who at the time of the trial was about eleven years of age, the daughter of the accused, was one of the two persons who were near the scene of the alleged homicide at the time of its occurrence. She was one of the principal witnesses upon whom the prosecution relied to establish the guilt of the accused. She testified to seeing her father standing by the coal stove in the sitting room, to observing him there take something from his pocket, to thereafter observing him and her mother in the front room, the mother being in the corner of the room on the floor and apparently unconscious, to immediately thereafter seeing her father in the kitchen with a revolver in his hand, and seeing him turn it upon himself and discharge it. Her evidence was very damaging to the defense. When counsel for the accused attempted to cross-examine the girl, he was denied the usual privilege of propounding leading questions. In fact, the right of cross-examination of the witness was in effect denied to the accused. Upon what theory the court ruled in that regard we are unable to understand. We must assume that the learned trial judge knew that the accused had the absolute right to have every witness who testified against him subjected to the ordinary test of cross-examination in the usual way, so long as that right was not abused, and that the right to ask leading questions on cross-examination, as a general rule, is just as absolute as the right of cross-examination itself. The proceedings upon the trial at this point seem to have been highly prejudicial to the accused. When his counsel attempted to cross-examine the girl in a proper manner, the court said: "Why can't you ask what did she say? What is the reason you have got to put leading questions to that child as you would to a witness of 35 or 40 years?" "You will not be permitted to do it any more. You will have to question her about as the State did. You didn't want them to lead her

and I won't let you lead her." To that counsel for the accused very courteously and properly replied, "I only want to lead her so as to get at the facts." That was followed by the court's saying: "You can get the facts by asking what she heard and what she saw." "If you can't you will have to get along without leading questions." "This child is only eleven, and if the State cannot lead her you cannot lead her." Counsel replied: "We are not to take what a child eleven years old says any more than if she was forty. We have a right to know on what she bases—" At that point the court broke in with the exclamation: "You can't put suggestive questions to her. She is his child and you cannot put suggestive questions to her." Counsel further firmly but courteously insisted upon his right to cross-examine the witness in the ordinary way, excepting to the rulings of the court, and saying that they, and the manner in which they were made, were prejudicial to the accused, that counsel had given no occasion therefor, and was only disposed to proceed fairly to elucidate the truth, whereupon the court said: "The court has ruled that you cannot ask leading questions of this child of eleven years of age, and whatever you get by way of examination you must get by putting questions to her about the same as you required the State to do." There is more of the same sort. We will not further quote from the record in regard thereto. Enough has been presented to show that the rights of the accused, at an important stage of the trial, were so violated that we must conclude that, for such error alone, he did not have a fair trial. No doubt a trial court has some discretionary power to restrict the putting of leading questions to a witness on cross-examination, but it by no means goes to the extent of justifying an arbitrary denial of the ordinary privileges of cross-examination upon the mere ground of the youth of the witness.

Exception was taken to the competency of several nonexpert witnesses called by the State on the special issue, to give opinion evidence as to the mental condition of the accused. Evidence of that kind is admissible when based on facts within the knowledge of the witness. Proof of such facts to the satisfaction of the trial court, so long as he rules within reason, is conclusive on the question of competency. Whart. Cr. Ev. § 357. We are unable to discover any good ground for holding that the court

transcended the bounds of reason in the rulings under consideration. Each of the witnesses gave evidence showing some familiarity with the life, habits and peculiarities of the accused, and upon that the court passed judgment on the question of competency.

The court instructed the jury on the special issue, in effect, that after the expiration of two years from the discharge of a patient from a hospital for the insane, without his having been recalled, the presumption of insanity as to such person, because of the adjudication upon which he was committed to the hospital, ceases, and that he is presumed to be sane; and that such rule applied to the accused. A law to that effect was passed in 1897 (chapter 319, Laws 1897). It was prospective in its terms, so did not apply to the accused, who was then on parole. By chapter 327, Laws 1899, passed after the alleged homicide, the act of 1897 was amended so as to affect all persons on parole, whether paroled prior to the passage thereof or thereafter. Counsel for plaintiff in error insists that he was entitled to the benefit of the presumption of insanity in his favor existing at the time of the alleged homicide. We are not familiar with any authority to sustain that proposition. The doctrine, once insane always insane till the contrary is established by evidence, is not and never was an absolute rule. It never applied to occasional or intermittent insanity, which was evidently the malady with which the accused was suffering on the two occasions when he was committed for treatment to the hospital for the insane. It is only where the insanity is once proven to exist and to have been of the character likely to become permanent that the rule contended for properly applies. *State v. Wilner*, 40 Wis. 304. Further, at most it is a mere rule of evidence, and as such subject to reasonable changes by the legislative will.

The court several times, in the course of his instructions to the jury upon both issues, spoke of the accused as if he were unquestionably the cause of the homicide; that he killed his wife. Exceptions were taken thereto. We are not prepared to say on the record that prejudicial error was thereby committed, but it seems that the question of the cause of the death was at issue and that the court should have as carefully avoided expressing any opinion on that question as on any other at issue in the case

which the jury were to decide. In a criminal case the accused is entitled to have every issue of fact passed upon by the jury. He has a right to stand upon that and put the prosecution to the proof upon every essential of the offense of which he stands charged, and to have his discharge upon the evidence by order of the court, or the issues of fact submitted to the jury on the evidence, without any suggestion from the bench as to where the truth lies. The better practice is to strictly regard that right at every step in the trial of such an important case as this, and not to take any chances of a conviction having to be sustained by invoking the doctrine that only prejudicial error can disturb it.

Exceptions were taken to the refusal of the trial court to so submit the case to the jury as to permit them to find a verdict of manslaughter in the first or fourth degree. It is unquestionably the duty of the trial court to submit to the jury in a case of this kind, by proper instructions, every phase of criminal homicide to which the evidence, in any reasonable view of it, applies. Failure so to do is not necessarily prejudicial and reversible error. It has often been held that where the jury are instructed, in effect, that the accused is guilty of some one of the higher degrees of criminal homicide, or not guilty, if error is thereby committed in that the evidence would admit of a conviction of some lesser degree of homicidal offense than the degree or degrees submitted, the error is favorable rather than unfavorable to the accused. *Dickerson v. State*, 48 Wis. 288, 4 N. W. 321; *Winn v. State*, 82 Wis. 571, 52 N. W. 775; *Fertig v. State*, 100 Wis. 301, 75 N. W. 960. However, it does not seem necessary to invoke that rule here, but we will say in passing that it is the better practice to always so try a case that there will be no necessity for invoking it,—to scrutinize the evidence with the greatest care, view it in the most favorable light it will reasonably admit of from the standpoint of the accused, and, whether requested or not, to submit to the jury every phase of criminal homicide to which it can be said reasonably to apply. We assume that the learned trial judge endeavored to do that and decided that there was nothing but mere conjecture upon which to base a verdict of manslaughter in either the first or fourth degree. We are unable to say that he was wrong, with sufficient clearness to condemn the rulings under consideration. The evi-

dence is undisputed that the accused and his wife were in the room together when the alleged homicide occurred, and that no one else was present; that he had a revolver in his hand just before the shooting and was seen with it in his hand immediately thereafter; that no noise was made in the room prior to the shooting except that caused by the conversation of Hempton and his wife; that some angry words were spoken by the woman, which were immediately followed by the report of a revolver. The place where the bullet entered the woman's head and the direction it took were such as to rather repel the theory of accidental shooting. The conduct of the accused immediately after the shooting was not consistent with such theory. The revolver was held so near the woman's head that it was discolored by the powder. The theory of accidental shooting seems to require conjecture that the accused pointed the pistol at his wife's head, holding it very near thereto, and that the weapon was, while in that position, accidentally discharged. There is no evidence, seemingly, to reasonably sustain any such theory; so we cannot say the trial court erred in so deciding and that the evidence did not point to any reasonable theory of accidental shooting. There was no suggestion of accident in the evidence, except that the accused, soon after his arrest, stated that he tried to scare his wife and that he guessed he scared her too much. *State v. Hammond*, 35 Wis. 315; *Pliemling v. State*, 46 Wis. 516, 1 N. W. 278, and *Terrill v. State*, *supra*, are authority to the proposition that there must be some evidence pointing with some reasonable degree of definiteness to guilt in a particular degree to justify submission of a case to the jury upon the theory that a verdict of guilty in such degree is proper. It would seem that no authority to that proposition is necessary.

On the subject of the significance to be given to the evidence that the accused was intoxicated at the time of the homicide, the jury were instructed: "If you find from the evidence that he fired the shot which killed his wife, and if when he did so he was in such a condition from the use of spirituous liquors that he was not capable of forming a premeditated intent to kill her, then you should consider the question of intoxication and you cannot convict him of murder in the first degree. But if he was able to form that intent to kill, willfully, deliberately and pre-

meditately, when he fired the shot, then you must have nothing more to do with the question of his drinking and you should give it no further thought or consideration in the case, for then it cuts no further figure." He further charged the jury that drunkenness was no excuse for crime and could not reduce the degree of a homicidal offense below that of murder in the first degree, if, notwithstanding the condition of drunkenness, the wrongdoer was capable of forming a deliberate intent to commit the homicide. Counsel for plaintiff in error confidently insists that such instructions were wrong. They are substantially in accord with the decisions of this court and the prevailing rule on the subject. In *Bernhardt v. State*, 82 Wis. 23, 51 N. W. 1009, the following instruction was approved as a strictly accurate statement of the law: "If you shall find from the evidence in the case that this defendant, at the time he struck the blow, was in such a condition from the use of spirituous liquors that he was incapable of forming an intent to kill, then you may consider the question of intoxication. The question simply is, in short, was he at the time in such a condition mentally as to be incapable of forming this premeditated design to effect the death?" The court remarked: "This instruction was direct, clear and to the point, and the jury could understand it. The point is, was he so intoxicated that he could not form the intent or the premeditated design to kill?" The same rule is laid down in *Cross v. State*, 55 Wis. 261, 12 N. W. 425, and *Terrill v. State*, *supra*. In *People v. Rogers*, 18 N. Y. 9, cited by this court in *Bernhardt v. State*, *supra*, there is a very full discussion by two justices of the significance to be given, in a prosecution for murder, to evidence of intoxication of the accused at the time of the homicide. Mr. Justice HARRIS said: "It has never yet been held that the crime of murder can be reduced to manslaughter by showing that the perpetrator was drunk, when the same offense, if committed by a sober man would be murder;" that to have that effect the defendant must be "so far deprived of his senses as to be incapable of entertaining a purpose, or acting from design." Courts have been very slow to break down the old common-law doctrine as regards the effect of voluntary intoxication of a person at the time of the commission of a criminal offense by him. Formerly it was held to aggravate rather than



to mitigate the offense. Now, if from passion, stimulated by intoxication or from any other cause, a person, for the moment, is unable to exercise his reason, and while he is in such condition, though conscious of what he is doing and not so completely bereft of reason as to be legally irresponsible he is uncontrollably moved thereby to and does wrongfully kill another, he cannot be convicted of murder in the first degree. *Clifford v. State*, 58 Wis. 477, 17 N. W. 304. It is the condition, no matter how caused overpowering and controlling reason, which reduces the offense to some lesser degree of criminal homicide. If reason, notwithstanding the intoxication or other disturbing cause, be not so completely dethroned, so to speak, but that the wrongdoer can exercise judgment, he must do so or pay the penalty of being held responsible for his acts regardless of such disturbing cause.

After the close of the trial counsel for appellant moved the court to set aside the verdict on the special issue as well as the one on the issue of not guilty, and grant a new trial, because of mismanagement and misconduct of the jury. Such motion was supported by affidavits of jurors, of clerks and boarders at the hotel where the jurors took their meals and lodged during the trial, and of other persons, to the effect, that the proceedings of the trial were from day to day published in newspapers with comments unfavorable to the accused, which the jurors were freely permitted to read; that among such comments was one made after the verdict on the special issue and before the commencement of the trial on the issue of not guilty, commendatory of the jury for having defeated a "lawyer's trick" to clear a murderer; that the jurors took their meals and spent their evening and morning hours and lodged at a hotel; that while there they were permitted to go about the hotel office, into the barroom and other public places of the building, and to mingle and talk with the people the same as other guests; that they divided into parties in the evening, some playing cards for drinks in the hotel barroom, one of the officers and one or more outsiders associating with them, while others were in the hotel office mingling with the people; that they ordered and partook of intoxicating liquor at the end of each game of cards, and went singly and in parties to the hotel bar and drank liquor without restraint and without care to avoid associating with outsiders; that they lodged at

night in four rooms which did not communicate with each other nor with the room occupied by the officers who were charged with attending them; that they retired at night and got up in the morning singly and in parties with perfect freedom, and went to their morning meal singly or together at their pleasure; in fact, that they conducted themselves at the hotel the same as other persons, talking with outsiders and permitting outsiders to talk with them; that they had ample opportunity to so talk about the case and to hear conversations between outsiders in respect thereto, and to become fully conscious of public opinion in respect to the trial and the guilt of the accused; that part of the jurymen visited a barber shop in company with an officer, and there sent for and drank intoxicating liquor; that the sheriff, who was not sworn to take charge of the jury, took them out for a ride and that they stopped at a wayside saloon and partook of liquor; that such sheriff and one of the officers sworn to take charge of the jury took them to a baseball game, where there were some manifestations by people present well calculated to be interpreted by the jury as approval of their verdict on the special issue, which had theretofore been rendered; that after the decision upon the special issue, jurors talked with persons at the hotel in respect to having to stay to hear the case through; that the jurors mingled with the people at and in the vicinity of the court house at times when the court was not in session, and that, generally, they were not kept together when outside the court room so as to interfere with their free communication with the people and free indulgence in intoxicating liquor. In opposition to the motion, affidavits of jurors were presented, to the effect that they neither talked with any one nor allowed any one to talk with them about the case during the progress of the trial, nor heard anything said which affected their verdict except what they heard in the presence of the court; that they partook of intoxicating liquor in small quantities but not so as to affect them; that they did not partake of intoxicating liquor at all while deliberating upon the case; that they read the newspapers but were not affected thereby; that they were not out of the sight of the officer or officers in charge of them during the trial; that there were occasional separations, but that in each case an officer was in attendance upon the juror or jurors who left their fellows, and an officer was also

in attendance upon those who remained. The officers who attended the jury testified to the same effect. The court denied the motion upon the ground that, while the conduct of the jurors was not what it should have been, upon all the proofs presented, excluding affidavits of the jurors presented in support of the motion, and from his personal knowledge of the jurors, it affirmatively and satisfactorily appeared to him that no improper influence reached the jury and that nothing was done by them, or omitted to be done, of an improper character which prejudiced the accused.

It appears that the court, in deciding the motion as above indicated, did not consider the affidavits of the jurors presented to impeach their verdict, but remarked that he was unable to see, in such rejected affidavits, anything that would call for a different conclusion from that reached. It is a well-settled principle of law that affidavits of jurors cannot be used to impeach their verdict, but that rule applies only to affidavits concerning their conduct in court or when deliberating upon the case. Their conduct outside the court room may be established by their own affidavits for the purpose of impeaching their verdict. *McBean v. State*, 83 Wis. 206, 53 N. W. 497; *Peppercorn v. City of Black River Falls*, 89 Wis. 38, 61 N. W. 79, 46 Am. St. Rep. 818; *Manix v. Malony*, 7 Iowa, 81; *Heffron v. Gallupe*, 55 Me. 563; *Harris v. State*, 24 Neb. 803, 40 N. W. 317; *Rush v. Railway Co.*, 70 Minn. 5, 72 N. W. 733; *Mattox v. U. S.*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917; 2 Thomp. Trials, § 2619. It follows that, in determining whether there was error in deciding the motion, the affidavits of the jurors as to their conduct outside the court room must be considered with all the other proofs bearing on the question.

If it can be said that such gross misconduct on the part of a jury as took place upon the trial of this case can be passed over as not prejudicial to the accused, upon the mere affidavits of the guilty members of the jury and their associate guilty officers, mostly to the effect that the jury were not prejudiced by such misconduct, the constitutional right to a trial by jury with substantially the common-law safeguards to prevent a miscarriage of justice, must be considered as having been effectually laid aside. True, the courts have gone a great way in sustaining verdicts,

even in capital cases, notwithstanding misconduct of the jury, upon a satisfactory affirmative showing that their impartiality and the result of their labors were not affected hereby. But we venture to say that no case can be found, certainly none that has the approval of this court, which approaches the one before us. There seems to be a growing tendency to looseness in the management of juries in important cases, which calls loudly for a check if not for a substantial reform, if judicial administration is to be kept above suspicion as regards weighing out justice with the highest attainable degree of certainty. At common law, in the trial of capital cases, the jury were required to be kept together from the time they were charged with the case till they were discharged by order of the court, and to be kept secluded from all outside influences of every nature calculated to interfere with their impartiality. They were not allowed to mingle and converse with the people, or have opportunity for reading newspaper or other accounts on the trial or be influenced by public opinion for or against the accused, or to indulge in the use of intoxicating liquor. The Constitution, in preserving the right of trial by jury, preserved it with its ancient safeguards, and any infraction thereof of a nature calculated to substantially impair the right cannot properly receive the sanction of the court. In most cases of the importance of the one before us, where misconduct of the jury was held not to constitute reversible error, there was but one or a few trifling transgressions which happened by mere thoughtlessness and which were shown with a high degree of certainty not to have affected the minds of the jurors one way or the other in the case. In *Keenan v. State*, 8 Wis, 132, there were two transgressions, one juror being permitted to go to his home and remain all night, and one to go to the depot on business. There being no affirmative proof that such separations worked no harm to the defendant, a new trial was granted. The court laid down the rule, which has since been consistently followed, that where there is misconduct on the part of a jury or any member thereof in a capital case, "unless it appears that it was not followed by improper conduct on their part, nor by any circumstance calculated to exert an improper influence on the verdict, the verdict should be set aside in case of a conviction." In *State v. Dolling*,

37 Wis. 396, the court permitted the jury to separate at meal times. The defendant was convicted of manslaughter in the third degree. On the motion to set aside the verdict upon the ground that the jury were allowed to separate during the trial, affidavits of all of them and of the officers who attended them were read, to the effect that during the separations nothing improper occurred, that they followed the directions of the court and neither talked with any one about the case nor allowed any one to talk with them, that they did not hear the case discussed during such times, and that nothing occurred during the separations which could or did prejudice them in the case. The question was certified to this court, whether a new trial should be granted under such circumstances. In deciding the case it was said, in effect, that the court was not inclined to give much effect to the exception to the general rule that jurors should not be permitted to separate in a capital case; that when jurors are allowed to transgress the rule requiring them to be kept together in such a case, they are liable to be subjected to such an infinite variety of improper influences and to become unconsciously biased thereby, that the only safe way is not to permit them to separate at all; that a juror is likely to be unconsciously guilty and to conscientiously deny his guilt, so that in the very nature of things the affidavits of jurors that they were not affected in the case by anything that occurred during the time of their separation, should not be considered of itself sufficient to overcome the presumption of prejudice against the accused arising from the violation of his right to have them kept secluded from all outside influences. The separation of the jury there under consideration, it should be remembered, was by express permission of the court under an admonition as to their conduct, and all of them testified that they strictly complied therewith, and there was no proof to the contrary. Nevertheless, this court held that the violation of the rights of the accused was too important to be passed over as not prejudicial to him in the absence of satisfactory proof to rebut the presumption of malice arising therefrom except that of the jurors themselves and the officers who attended them. In *Roman v. State*, 41 Wis. 312, one of the jurors obtained some intoxicating liquor for himself and gave some to several of his associates. Proof was

made by the affidavits of the jurors that only a few of them knew of the liquor being obtained and that those who drank of it were not affected thereby. The court held that the rule laid down in *Keenan v. State* was satisfied, but said that the doctrine in this State is that, "if upon all the proofs presented to rebut the presumption of prejudice arising from misconduct of a jury in a capital case there remains reasonable ground to suspect that the misconduct may have influenced the verdict, the required proof is wanting and the verdict should be set aside."

From the foregoing it will be seen that the law governing the subject under discussion is so well settled for this State that it is needless to look elsewhere for guidance. We must hold that to allow a jury to go to a hotel, mix with the people there without restraint, play cards in public places surrounded by other persons, go singly and in groups to the hotel bar and indulge in drinking intoxicating liquor, to have the free use of newspapers, and, generally, to be in and about a hotel and other places singly and in groups associated with other persons, even though within sight of attending officers, to all intents and purposes violates the spirit if not the letter of the rule that they must not separate during the trial. Such rule means that the jury must be kept together so far as practicable, in a body, secluded from association with all other persons and all outside influences.

It will be readily seen from what has been said that the showing made to rebut the presumption of prejudice arising from the gross misconduct of the jury in this case was clearly insufficient to meet the rule laid down in *Keenan v. State* and to warrant the conclusion reached by the trial court. It was substantially the same kind of proof that this court said was wholly insufficient in *State v. Dolling, supra*, while the presumption of prejudice, required to be met and overcome by it, was very much stronger. In the *Dolling Case* there was no proof of misconduct while the jury were separated. The separation was erroneously permitted by the court. In this case the separation of the jury was wholly unknown to the court except as it should have been, inferred from the fact that they were permitted to go to a hotel for meals and to be lodged there without express directions to the officers to keep them apart from all outsiders. Not only do

we have here misconduct of the jury in separating, but misconduct in reading the newspapers, associating generally with the people, and in other things of an improper character that have been detailed which were well calculated to exercise an improper influence upon their minds. The language of the exception to the general rule that a separation of the jury is fatal to a verdict of conviction in a capital case, is, as before indicted, limited to cases where it appears that the separation was not followed by improper conduct of the jurors or by any circumstance calculated to exercise an improper influence upon the verdict. It does not satisfy the exception for jurors to say that nothing occurred calculated to prejudice them. The court t be able to say that independent of the notions of the guilties, and must, before doing so, be satisfied beyond a reasonable doubt that such is the fact, keeping in mind how easily persons may be influenced by their environment without being conscious of it. The reading of the newspaper accounts and comments upon the trial was highly calculated to influence the minds of the jurors. The freedom with which they mingled with the people was well calculated to impress upon them the prevailing opinion as regards the guilt or innocence of the accused, and to give them a leaning in harmony therewith and they be wholly unconscious of it. Such conduct and the free indulgence in the use of intoxicating liquor were exceedingly inconsistent with the mental attitude which the law contemplates shall be maintained in dealing with the very life, as it were, of the person on trial, and interests of society of the highest moment as well. The practice of taking juries to a public hotel in such cases cannot be looked upon with favor. It is almost impossible to make officers and jurors so understand and appreciate their duties in a capital case that the jury can safely be permitted to have such liberties. The only really safe way to keep them free from all outside influences is to keep them together according to the spirit as well as the letter of the rule on the subject, to keep them absolutely free from all opportunity of mixing with outsiders, or from knowing the state of public opinion of the case, as expressed in the newspapers or otherwise. To do that entails some hardships on the jurors, it is true, but no juror, who fully appreciates the gravity of his situation in such a case and is fully worthy to



enjoy the blessing of citizenship, will complain. On the contrary, it is believed the more carefully a jury of such men are guarded from outside influence, the more respect they have for the law and the more oblivious they become, for the time being, to matters of mere personal comfort, and the more willing they are to forego such matters, to the end that their final result may be above all suspicion of having been influenced by anything but the evidence and the law given in court. Experience shows that a jury may be guarded to the very extreme here indicated without subjecting them to any discomfort prejudicial to health, and with their enthusiastic approbation and endeavor to second the efforts of the court to administer justice on the highest attainable plane of impartiality and certainty.

In deciding this case we have not taken into consideration the probability or improbability of the guilt of the plaintiff in error. Regardless of where the truth lies on that question, he is entitled to his day in court with all the safeguards for his protection guaranteed by the law. It is not improbable but that, in some cases, an accused person is so universally believed to be guilty in advance of his trial as to cause the trial court to unconsciously relax the care which should be exercised in all such cases. In truth, if greater care should be exercised in one case than in another, it should be in the one where, in advance of the trial, in the public mind, there is no reasonable doubt of guilt. As the certainty of guilt increases there should be increase rather than relaxation of care to conform to all the requisites necessary to a legal conviction, to the end that justice may not miscarry.

The judgment of the Circuit Court for Manitowoc County is reversed and the cause is remanded to such court for a new trial, for which purpose the warden of the State prison is directed to deliver the plaintiff in error, James L. Hempton, to the sheriff of such county, who is directed to safely keep the said Hempton in said custody until discharged therefrom or otherwise ordered according to law.

## STATE V. MORGAN.

23 Utah, 212—64 Pac. Rep. 356.

Decided February 2, 1901.

**TRIAL:** *False statements by jurors on voir dire—Bias of jurors, and weight of their affidavits—Falsus in uno, falsus in omnibus—A constitutional right implies a power to enforce it—Power of court to entertain a motion for new trial, after affirmance of judgment—Construction of statutes.*

1. When it appears after trial that a juror had beforehand prejudged the case, but had improperly withheld this fact before acceptance, or when asked as to opinion on *voir dire* had given false answers, and such formation of opinion was unknown to the party at the time, a new trial will be granted.
2. The object of an examination of a juror on his *voir dire* is to ascertain whether there are grounds for a challenge for either actual or implied bias; also to enable the accused to exercise intelligently his peremptory challenge; and, when the juror is conscientious and truthful, such examination is of great utility; but when some of the jurors selected are untruthful, and conceal their bias, when such exists, or deny facts which show either actual or implied bias, the accused is misled, and deprived of the important benefits which he would otherwise derive from such examination, as well as of his right to a trial by an impartial jury.
3. Where a challenge for actual bias is made by the accused, and the fact upon which the challenge is based is denied by the State, under sections 4838-4840, Revised Statutes of 1898, the accused is entitled to have the issue tried, and witnesses on either side may be summoned and examined under the same rules of evidence applicable in the trial of other issues.
4. The jury being composed of twelve individuals, the misconduct of any juror, actual or implied, "by which a fair and due consideration of the case may have been prevented," is misconduct of the jury, because the jury can only act as a unit, and the misconduct of one of the members cannot be eliminated, and therefore, in such cases, the action of the jury as a whole is invalid.
5. Misconduct by one or more of the jury, which might have been prejudicial to the accused, raises the presumption, especially in a capital case, that the accused has been prejudiced thereby, and vitiates the verdict, unless the prosecution shows beyond a reasonable doubt that the prisoner has received no injury by reason thereof.
6. Where, in a criminal case, the admitted facts show both actual and implied bias of two of the jurors, there is sufficient ground for granting a new trial, under section 4952, Revised Statutes of 1898.
7. The right of one accused of crime to "a speedy public trial by an impartial jury," guaranteed by section 12, article 1, Constitution,

cannot be defeated by reason of the want of any legislative remedy for a wrong inflicted during a criminal trial; for the court will resort to the common law if it affords a remedy, and, if it does not, then courts, by virtue of their inherent power, and their duty in criminal cases to guard the rights of persons, will, if possible, devise new remedies.

8. Under the provisions of section 2, article 24, Constitution, section 5136, 2 Comp. Laws 1888, is still in force, and not being inconsistent with either section 12, article 1, or section 9, article 8, Constitution, gave the defendant the right to move for a new trial upon facts discovered after judgment, and to appeal from an order refusing to set aside the judgment and grant a new trial.
9. After judgment in a criminal case has been affirmed on appeal, and the case remanded, a motion for a new trial, based upon facts which were not passed upon by the Appellate Court or discovered before the appeal was taken, can be entertained by the trial court. (Syllabus by the Court.)

Appeal from District Court, First District; Hon. C. H. Hart. Judge.

James Morgan, convicted of murder, appeals. Reversed.

*Thos. Fitch and R. H. Jones*, for the appellant.

*A. C. Bishop*, Attorney General, and *William A. Lee*, Deputy Attorney General, for the State.

BASKIN, J. It appears from the record that on the 12th day of May, 1899, the defendant James Morgan, alias Abe Majors, was convicted in the First Judicial District Court in and for Boxelder County of the crime of murder in the first degree, and on the 16th day of May was sentenced to be shot, by the sheriff of said county, on the 7th day of July, 1899; that the defendant appealed from said judgment, and this court, at the May term thereof, affirmed the judgment (61 Pac. 527); that, after the remittitur in the case reached the said District Court, said court, on the 2d day of July, 1900, made and entered an order requiring the sheriff of Boxelder County to execute the judgment and sentence aforesaid on the 17th day of August, 1900; that on the 7th day of August, 1900, defendant made, in pursuance of the notice thereof previously given, a motion to vacate said judgment, and grant a new trial, and on said day the said District Court made and entered an order overruling said motion; whereupon the defendant appealed to this court from said order.

The first ground of the motion is that William Fosgren and Robert C. Harris, two of the jurors who sat upon the case, previous to being chosen as jurors, used expressions to various persons which showed a bias against the defendant, and yet these jurors, when examined on their *voir dire*, answered that they had neither formed nor expressed an opinion as to the guilt of the defendant. The expressions referred to are set out in the affidavits read in support of said motion, and from which the following quotations are made: James Boden, in his affidavit, stated: "I am well acquainted with William Fosgren, who afterwards acted as a juror in the case of the *State v. James Morgan*, and for an hour on the afternoon of the 30th of April he and I talked together about the occurrence, and for more than half an hour before Deputy Sheriff Thompson brought in Abe Majors in town in a buggy. Fosgren and I during the half hour previous to that sat on the coping of the court-house fence, on the northwest corner. Will Fosgren brought the question up, and he said, 'I hope they will kill them before they bring them up, so as to have no bother.' I then made some statement in reply, and he said, referring to the defendant, 'He had ought to be lynched.'" Reese Richards in his affidavit stated: "I am a citizen of the United States, of the age of 55 years, and have resided in Brigham City for 37 years last past. I am acquainted with William Fosgren. Some two or three days subsequent to the killing of William A. Brown, to wit, on or about the 4th day of May, 1899, in Brigham City, I had a conversation with William Fosgren relative to the killing of Brown. The conversation took place in front of Wheelwright's store, upon the sidewalk. William Fosgren told me that he had known Capt. Brown for some time, and that he was a friend of his; he having worked for him. He told me that Abe Majors had ought to be hanged, and he would only be getting what was due him, and then the debt would not be paid." Alviras Thompson, in his affidavit, stated: "I was in Brigham City early in May of 1899, standing by the gate in the court-house grounds, in company with William Fosgren, Vern Phillips, and others, whose names I can not recall, and I heard Fosgren say that James Morgan ought to suffer death; that if he (Fosgren) was on the jury he would have him convicted; and that he, the said

Morgan, deserved to die. Afterwards, at the trial, when I learned that William Fosgren was on the jury, it seemed strange that he should sit on the trial after what I heard him say, but I said nothing to anybody about it." Charles E. Foxley, in his affidavit, stated: "I am a citizen of the United States, over the age of 21 years, and have been a resident of Boxelder County for twenty-four years. At present am manager of Foxley Bros. store, and assistant postmaster at the Point Lookout post office. That I delivered, on or about the 6th day of May, 1899, to Robert C. Harris a registered letter, which letter he opened in my presence, and which contained a subpoena as a juror for the May, 1899, term in the above-entitled court. That I stated to him that I supposed he would sit on the Morgan murder case. That he said, 'No, I guess not; as I have formed an opinion, and he is only a hobo, and ought to be hung.' I have this day informed the attorneys for the defendant for the first time of this conversation, and know that they knew nothing of it before." In the examination of William Fosgren on his *voir dire*, he was asked, 'From what you have heard or read, have you formed or expressed an unqualified opinion as to the guilt or innocence of the defendant?' and he replied, "I don't know as I have expressed any opinion at all." He further stated that, from what he had heard, he had formed somewhat of an opinion as to the guilt or innocence of the defendant, but did not know of any reason why he could not sit in the case as a juror, and a just verdict render, according to the evidence as given by the witnesses, and according to the law as laid down by the court. The other juror, Robert C. Harris, stated on his *voir dire* that he had neither formed nor expressed an opinion as to the guilt or innocence of the defendant.

The declarations of these jurors, as set out in said affidavits, were unknown to either the defendant or his attorneys until the 26th day of July, 1900. Both of said jurors made affidavits on behalf of the State on said motion, but did not deny the statements attributed to them in the affidavits made in support of said motion, nor is there anything in the record contradicting these affidavits, and therefore they must be considered as admitted. It is evident that these jurors were biased, and purposely made false statements under oath, in order to qualify as

jurors. Especially is this so in respect to the juror Fosgren; for neither of these jurors in his affidavit denies that he had made the statements attributed to him, or stated that he did not remember, when being examined, that he had made such statements, or alleged any excuse whatever for failing to reveal what he had previously said respecting the defendant. There is an overwhelming array of authorities which hold that facts similar to those disclosed in this case disqualify a juror, vitiate the judgment, and, entitle the defendant to a new trial.

The following text of section 844, Whart. Cr. Proc., is supported by numerous cases cited in note 2, to wit: "When it appears after trial that a juror had beforehand prejudged the case, but had improperly withheld this fact before acceptance, or when asked as to opinion on *voir dire* had given false answers, and such formation of opinion was unknown to the party at the time, a new trial will be granted." *Sellers v. People*, 3 Scam. 413; *State v. Taylor*, 64 Mo. 358; *State v. Wyatt*, 50 Mo. 309; *Henrie v. State*, 41 Tex. 573; *Sam v. State*, 31 Miss. 480; *Busick v. State*, 19 Ohio, 198; *Chartz v. Territory* (Ariz.), 32 Pac. Rep. 166; *Territory v. Kennedy*, 3 Mont. 520; *Moncrief v. State*, 59 Ga. 470; *Romaine v. State*, 7 Ind. 63; *People v. Reece*, 3 Utah, 72, 2 Pac. Rep. 61; *U. S. v. Christensen*, 7 Utah, 26, 24 Pac. Rep. 618; 1 Bish. Cr. Proc. § 949b, and note 1; Maxw. Cr. Proc. p. 648.

The State, instead of contradicting the facts upon which the motion is based, resists the motion on the grounds that a new trial can only be had upon the grounds and within the time specified in section 4952, Rev. St. 1898; that the ground of the motion is not specified in said section, and the motion was not made within the time prescribed. It is provided in said section that, "when a verdict shall have been rendered against the defendant, the court may, upon his application, grant a new trial in the following cases only: (1) When a trial shall have been had in his absence, if the information or indictment is for a felony. (2) When the jury shall have received out of court any evidence, other than that resulting from a view of the premises, or any communication, document, or paper referring to the case. (3) When the jury shall have separated without leave of the court, after retiring to deliberate upon their verdict,

or have been guilty of any misconduct by which a fair and due consideration of the case may have been prevented. (4) When the verdict shall have been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors. (5) When the court shall have misdirected the jury in a matter of law, or shall have erred in the decision of any question of law arising during the course of the trial, or shall have done or allowed any act in the case prejudicial to the substantial rights of the defendant. (6) When the verdict is contrary to law or evidence. (7) When new evidence shall have been discovered, material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial."

The Territorial Supreme Court of Utah, in the cases of *People v. Reece*, 3 Utah, 72, 2 Pac. 61, and *U. S. v. Christensen*, 7 Utah, 26, 24 Pac. 618, which are analogous to the case at bar, granted a new trial notwithstanding section 5340, 2 Comp. Laws 1888, which was then in force, was the same as section 4952, Rev. St. 1898, except that the term "only" contained in the latter was not in the former section.

In the case of *People v. Reece*, *supra*, a juror, upon his examination under oath as to his qualifications, said he was a citizen of the United States. The defendant, after he was convicted, discovered that the juror was not a citizen of the United States, and on that ground moved for a new trial, which was refused by the trial court. On appeal, it being admitted that a person not a citizen of the United States was disqualified to act as a juror, the Supreme Court granted a new trial on the ground that the defendant had been deprived of his constitutional right.

In the case of *U. S. v. Christensen*, *supra*, the court said: "He (the defendant) moved for a new trial upon the ground, among others, of misconduct of the jury tending to prevent a fair and due consideration of the case, based upon affidavits showing that one John Harris, who was one of the petit jury which convicted him, was on the grand jury which found the indictment, and that the fact was not known to him or his counsel until after the verdict, and that the juror stated falsely on his *voir dire* that he had not formed or expressed an un-



qualified opinion as to the guilt or innocence of the accused of the offense charged. . . . He may have voted against finding the indictment, or may have been absent when it was found, as twelve of the fifteen jurors constitute a quorum, and may transact business; but the presumptions of the law are all to the contrary, and, in the absence of any showing to that effect, he must be presumed to have participated in the finding of the indictment, and to have formed an opinion as to the guilt or innocence of the defendant. . . . Having served on the grand jury which found the indictment, and having formed or expressed an opinion or belief that the prisoner is guilty or not guilty of the offense charged, are each a ground of challenge to a juror for implied bias. 2 Comp. Laws 1888, § 5022, subs. 4, 8. And where the accused properly examines the jurors concerning their qualifications, and they do not answer truthfully, he is thereby not only deprived of his right of challenge for cause, but may also be prevented from exercising his right of peremptory challenge. If, in such a case, a defendant, in trying to ascertain whether the jurors are competent or not, without negligence on his part, is denied a new trial, the greatest injustice might be done." The order granting a new trial was affirmed. It appears from the quoted statements of the court that the motion was based upon the provisions of subdivision 3 of section 4952, Rev. St. 1898.

In the case of *People v. Plummer*, 9 Cal. 299, it appears that two jurors, George T. Getchel and J. D. Denny, answered satisfactorily on their *voir dire*, and among other matters stated that they had not formed or expressed an opinion as to the guilt or innocence of the defendant, and were accepted as jurors. It was shown by affidavits on a motion for a new trial that one of the jurors had, previous to the trial, said in the presence of a number of persons that "the people of Nevada ought to take the defendant out of jail and hang him," and the other juror said that "the defendant ought to be hung before night," and one of the affiants heard the same juror say, at a different time and place, that "if the defendant got his dues they would hang him." In the opinion of the Supreme Court, which was concurred in by that eminent judge, the late Stephen J. Field, the court said: "In support of his motion for a new trial, de-

defendant offered evidence to show that certain jurors who acted in the trial of the cause were incompetent from actual bias; and the question is presented whether an objection to the competency of a juror can be taken after verdict. On this point we have no doubt. . . . It is clear that neither of these jurors was competent to sit upon the trial of defendant, if, indeed, they were competent to sit in any case involving the life or liberty of a citizen. A man who could so far forget his duty as a citizen, and his allegiance to the Constitution, as to openly advocate taking the life of a citizen without the form of law, and deprive him of the chance of a jury trial, would not be likely to stop at any means to secure, under the forms of a legal trial, a result which he had publicly declared ought to be accomplished by an open violation of the law." The judgment in that case was reversed, and a new trial ordered. The motion for a new trial, as appears from the brief of the defendant's attorney, was based upon section 440 of the criminal practice act (Wood's Dig. p. 304). Said section, as it appears in said Digest, is as follows: "The court in which a trial is had upon an issue of fact has power to grant a new trial where a verdict has been rendered against the defendant, upon his application, in the following cases only: (1) When the trial has been had in his absence, if the indictment be for felony. (2) When the jury has received any evidence out of court other than that resulting from a view as provided in section three hundred and ninety. (3) When the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or been guilty of any misconduct tending to prevent a fair and due consideration of the case. (4) When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors. (5) When the court has misdirected the jury in a matter of law. (6) When the verdict is contrary to law or evidence." The only difference between this section and section 4952 of the Revised Statutes of Utah of 1898 is in the fifth subdivision of the same.

In the case of *People v. Turner*, 39 Cal. 370, the facts are stated in the opinion of the court. The court in the opinion said: "After an issue of fact is joined in a criminal case, every step thereafter taken for the purpose of a determination of that

issue in the court where the cause is pending, up to and including the verdict upon such issue, must be regarded as a step or proceeding 'arising during the course of the trial,' within the meaning of section 440 of our criminal practice act; hence any substantial error of the court upon any matter or question intervening between the joining of issue of fact and the rendition of a verdict thereon, and any misconduct of a juror who participates in the verdict, from the time he is called in the case and sworn and examined on his *voir dire* up to the final act of rendering the verdict, is proper ground for a motion for a new trial under said section. . . . It appears by the affidavit of Samuel Kearney that said juror, Reed, after he had been called and interrogated on his *voir dire* as to his qualification as a juror in the case, and before he was finally sworn as a juror, attended and remained at a public meeting in Los Angeles, at which meeting the charge against defendant upon which Reed had been called to pass as a juror was under discussion, in which defendant was denounced in most bitter terms. It further appears by the affidavit of Lewis Green that this same juror, Henry Reed, during the progress of the trial, after the evidence was closed, talked to the affiant, Green, on his way to the court, and said, in reference to the case, 'that he would not talk about the case, but that his opinion was made, and that nothing could change him.' . . . A defendant on trial for felony 'is entitled to all the protection which the statute intends to secure against any interference with the action of the jury, whether arising from the hostility of personal enemies or popular prejudice'; and when it is shown, either that a juror has engaged in a conversation with others on the subject of the charge upon which he is to pass, or has voluntarily listened to the remarks of others addressed to himself or to third parties upon matter connected with the charge upon which, as a juror, he has been called upon to pass, then such conduct is *prima facie* established as to authorize the court for that reason to set aside the verdict."

The impropriety of the juror's acts in the case at bar are more flagrant than the conduct of the juror in the case of *People v. Turner*, for each of the former made under oath false statements on his *voir dire* that he had not formed or expressed an opinion as to the guilt or innocence of the defendant. That

their statements were false is not disputed. If they had stated on their *voir dire* the undisputed facts, the attorneys of the defendant would no doubt have challenged the jurors for actual bias; for it is not supposable that any attorney defending a prisoner charged with a capital crime would permit any juror, who had expressed such hostility, to serve on the trial of his client, without objection. Upon the admitted facts, both of the jurors were disqualified, and could have been successfully challenged, both at common law and upon the grounds specified in subdivision 2, § 4833, and subdivision 8, § 4834, Rev. St. 1898, to wit: "For the existence of a state of mind on the part of the juror which leads to a just inference, in reference to the case, that he will not act with entire impartiality, which is known in this Code as actual bias;" and "having formed or expressed an unqualified opinion or belief that the prisoner is guilty or not guilty of the offense charged." *People v. Edwards*, 41 Cal. 640; *People v. Brotherton*, 43 Cal. 530. The object of an examination of a juror on his *voir dire* is to ascertain whether there are grounds for a challenge for either actual or implied bias; also to enable the accused to exercise intelligently his peremptory challenge; and, when the juror is conscientious and truthful, such examination is of great utility, but when some of the jurors selected are untruthful, and conceal their bias, when such exists, or deny facts which show either actual or implied bias, the accused is misled, and deprived of the important benefits which he would otherwise derive from such examination, as well as of his right to a trial by an impartial jury. Where a challenge for actual bias is made by the accused, and the fact upon which the challenge is based is denied by the State, under sections 4838-4840, the accused is entitled to have the issue tried, and witnesses on either side may be summoned and examined under the same rules of evidence applicable in the trial of other issues. By the false statements of these jurors, undisputed facts were concealed from the defendant, which, if revealed, would have been sufficient ground on which to sustain a challenge for both actual and implied bias, and which, if overruled, would have been error. Motions for new trials were evidently sustained in the Territorial and California cases, before cited, on the ground mentioned in the last clause of sub-

division 3, § 4952, Rev. St. 1898, which is "misconduct [of the jury] by which a fair and due consideration of the case may have been prevented." The State's attorney contends that the only ground for a new trial, under the provisions of said subdivision, is the misconduct of the jury as a body; that the misconduct of a juror before he is sworn as such is not a ground for a new trial, under its provisions. The jury being composed of 12 individuals, the misconduct of any juror, actual or implied, "by which a fair and due consideration of the case may have been prevented," is misconduct of the jury, because the jury can only act as a unit, and the misconduct of one of the members cannot be eliminated, and therefore in such cases the action of the jury as a whole is invalid. The cases are numerous which hold that misconduct by one or more of the jury, which might have been prejudicial to the accused, raises the presumption, especially in a capital case, that the accused has been prejudiced thereby, and vitiates the verdict, unless the prosecution shows beyond reasonable doubt that the prisoner has received no injury by reason thereof. *State v. Prescott*, 7 N. H. 287; *People v. Backus*, 5 Cal. 275; *People v. Thornton*, 74 Cal. 482, 16 Pac. 244; *People v. Turner*, 39 Cal. 370, 375; *People v. Brannigan*, 21 Cal. 338; *Weis v. State*, 22 Ohio St. 486; *State v. Dolling*, 37 Wis. 396; *Lewis v. State*, 9 Smedes & M. 115; *Davis v. State*, 35 Ind. 496; *Westmoreland v. State*, 45 Ga. 225; *Organ v. State*, 26 Miss. 78; 1 Bish. Cr. Proc. § 999, and note 3. Suppose that these jurors, instead of making false statements under oath, had, after being sworn as jurors, been bribed to convict the defendant; it certainly would be presumed, upon that fact being shown on a motion for a new trial, that their action had been influenced by the bribe, and that their verdict was the result of "means other than a fair expression of opinion on the part of all the jurors." Subdivision 4, § 4952, Rev. St. 1898. But suppose such a bribe had been received by these jurors after they were summoned, but before they were sworn on their *voir dire*; would not the same presumption arise? It is clear that either of the supposed events is good ground for granting a new trial, under both subdivisions 3 and 4, § 4952, Rev. St. 1898.

The admitted facts show both the actual and implied bias of

the jurors, and that under oath they not only denied their bias, but concealed the facts which would have conclusively shown such bias, and by so doing they caused themselves to be retained upon the jury. Now, is not the presumption as strong that their bias influenced their action, and that the verdict was the result of "means other than a fair expression of opinion from the evidence on the part of all of the jurors," as the presumption in the supposed case of bribery, or the presumptions mentioned in the numerous cases hereinbefore cited under this head? The admitted facts furnish grounds for granting a new trial, under section 4952, Rev. St. 1898. Each of these jurors in his affidavit states that he acted impartially in the case, but, in view of their false statements and concealments of the facts admitted on this motion, their statements are not sufficient to overcome the presumption arising from the admitted facts; for it is a maxim of general application to witnesses, "*Falsus in uno, falsus in omnibus.*" Such jurors, as said in *People v. Plummer*, *supra*, "would not be likely to stop at any means to secure, under the forms of a legal trial, a result which they had publicly declared ought to be accomplished by an open violation of the law."

Among the personal safeguards contained in section 12, art. 1, Const., is the right of the accused in a criminal case to "have a speedy public trial by an impartial jury." Few, if any, more flagrant violations of that right, especially when the accused's life is in jeopardy, can be imagined, than the presence on the jury of one or more individuals having either actual or implied bias against the prisoner, and who had under oath falsely qualified as jurors. The construction placed upon the provisions of section 4952, Rev. St. 1898, in the case of *People v. Fair*, 43 Cal. 137, and contended for by the attorney for the State in this case, if accepted, would destroy all remedies for such flagrant violation of the defendant's constitutional right to a trial by an impartial jury. Such a construction is untenable, not only for the reasons already advanced, but it is a maxim of general application, "*Ubi jus, ibi remedium.*" 1 Term R. 512; Co. Litt. 197; *Entick v. Carrington*, 19 Howell, St. Tr. 1066; Broom, Leg. Max. 147. And, when the wrong is the violation of constitutional rights, the legislature has no

power to prohibit, or substantially impair, all remedies, as to do so would be a violation of the Constitution. In the absence of any legislative remedy for such wrongs, the courts will resort to the common law, if it affords a remedy, and, if it does not, then the courts, by virtue of their inherent power, and their duty in criminal cases to guard the rights of persons, will, if possible, devise new remedies, as has been done from a very remote period of time, by equity courts, to meet new conditions, and supply remedies for wrongs when none already existed. Bishop, in the first volume of his work on Criminal Procedure (sections 113, 115, 307), says: "A right of which the possessor cannot avail himself is practically no right. Hence every person before a court must be suffered, in some way, to take advantage of every right which he is admitted to have. Thus, statutes changing the procedure must be so construed as not to leave a prisoner remediless with respect of any acknowledged right. Though a right not secured by the Constitution may be taken away, even this construction should be avoided unless its terms are direct. . . . It is a doctrine extending through every department of the law, that rights, when vested in individuals, are unchangeable, while the remedies by which those rights are enforced may be varied from time to time, at the pleasure of the Legislature. Now, within this principle, the absolute rights of prisoners, especially the constitutional one, in respect of their defense, cannot be taken away. But they can be modified as to time, place, and manner of their enforcement,—only the substance of them must be preserved. . . . The doctrine is of the highest importance, and it pervades the entire law of criminal procedure. . . . The judge should counsel and assist the prisoner, and the prosecuting officer should avoid what ever might lead to an unjust conviction." Black, Const. Law, § 171. The opinion in the case of *People v. Fair*, 43 Cal. 137, cited by the attorney for the State, fully sustains his contention, and in terms overrules the case of *People v. Plummer*, *supra*, but makes no reference to the case of *People v. Turner*, *supra*. The reasons assigned in the opinion in the case of *People v. Fair* for overruling *People v. Plummer* are not sound, but this overruled case, and the case of *People v. Turner*, are supported by sound reason, and, as they are in harmony with the decisions



of the Territorial Supreme Court before quoted, they should be followed, rather than the case of *People v. Fair*.

Under another view of the case, the defendant is entitled to have the judgment vacated, and the case remanded for a new trial. Under section 12, art. 1, of the State Constitution, it is provided that the accused shall have "the right to appeal in all cases;" and it is provided in section 2, art. 24, that "all laws of the Territory of Utah now in force, not repugnant to the Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the Legislature." At the adoption of the Constitution, subdivision 3, § 5136, of the criminal procedure act of the Territory (Comp. Laws 1888, p. 729), was in force, and provides that an appeal might be taken from an order made after judgment affecting the substantial rights of the defendant. This provision has not been repealed or amended, but is still in force, and is not inconsistent with either section 12, art. 1, or section 9, art. 8, Const., which allows appeals from all final judgments; for it cannot, with any show of reason, be claimed that the granting of an appeal from an order made after judgment, which affects a substantial right, in any way conflicts with the section of the Constitution allowing an appeal in all criminal cases, or is inconsistent with the section allowing an appeal from all final judgments.

As the defendant did not discover the facts in regard to the violation of his constitutional right to a fair trial by an impartial jury until long after sentence of death had been passed upon him, the motion under consideration was the only way in which he could seek redress for the wrong, and as it was necessarily made after judgment, and affected his substantial right, he not only had a right to make the motion, but also had the right to appeal from the order refusing to set aside the judgment and grant a new trial, unless, as claimed by the State, he failed to move in proper time.

Under section 4953, Rev. St. 1898, a motion for a new trial, if based upon the grounds of subdivisions 3 or 4 of section 4952, must be filed and served within 30 days after the discovery of the facts upon which the party making the motion relies. The admitted facts set out in the affidavits filed in support of the motion in this case were, as appears from said affidavits, not dis-

covered by defendant until the 26th day of July, 1900. The motion was overruled on the 7th of August of that year, so that the motion was made within the time prescribed by statute. Previous to filing the motion, an appeal had been taken from the judgment by the defendant, and the judgment affirmed by this court, and the case remanded to the court below. This raises the question whether, after a judgment has been affirmed on appeal, and the case remanded, a motion for a new trial, based upon facts which were not passed upon by the Appellate Court or discovered before the appeal was taken, can be entertained by the court below. In the case of *Nugent v. Railway Co.* (Sup.) 61 N. Y. Supp. 476, the court said: "It is also argued that the motion should have been denied on the ground of laches. We do not think so. In *Keister v. Rankin* (Sup.) 54 N. Y. Supp. 274, this court held, the presiding justice rendering the opinion, that 'it is never too late to do justice. When the ends of justice require that a new trial should be had, the Supreme Court may act, although the case may have been to the Court of Appeals and disposed of there.' The court is constituted to enforce legal rights and redress legal wrongs, and whenever it is made to appear, as it is in this case, that a wrong has been perpetrated, it never hesitates to exercise the power which it has, unless to do so would do a greater injury than to refuse to exercise it." In *Keister v. Rankin* (Sup.) 54 N. Y. Supp. 274, referred to, the judgment had been affirmed by the Appellate Court, yet a new trial was ordered to be granted by the court below. *Cook v. Smith*, 58 Iowa, 607, 12 N. W. 617. The last case arose under provisions similar to those of section 4954.

It was suggested in the argument that the board of pardons is the only body that can grant the defendant any relief. If that body should, upon application, commute the sentence of the defendant to imprisonment for life, or to a shorter term, still the fact would remain that that punishment, if inflicted, would be in violation of his constitutional right, and, if he should be pardoned, then he would escape punishment for a crime of which a fair and impartial jury might find him guilty. It is ordered that the order of the lower court denying defendant's motion be set aside, at respondent's costs, and the case be

remanded, with directions to the court below to vacate the judgment and grant a new trial.

MINER, C. J. (concurring in the order). I am satisfied, from the showing made from the record, that the appellant did not have a fair trial because of the expressed bias of two of the jurors who were allowed to pass upon the question of his guilt; and while I entertain a grave doubt as to the power of the court, under section 4953, Rev. St. 1898, to consider the case and grant a new trial because of the delay in presenting the motion, yet, because of the serious consequences attending the execution of the judgment, under the facts shown I am constrained to give the accused the benefit of that doubt, and therefore concur in the order granting him a new trial.

BARTCH, J. (concurring in the judgment). The affidavits on the part of the defendant in this case show that two of the jurors who convicted him had previous to the trial formed and expressed unqualified opinions adverse to the prisoner, and, as appears, were prejudiced, and acted under the influence of bias, in the consideration of the question of his guilt. The prosecution has failed, satisfactorily, to show the contrary, or that it the defense, in the exercise of reasonable diligence and vigilance, could have discovered the bias and prejudice. A very careful examination and consideration of the record now before us impels the conclusion that the trial was not conducted before a fair and impartial jury, as required by law. Such being the fact, and this being a case in which the death penalty is to be inflicted, I concur in the judgment granting a new trial.

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STATE v. SMITH.

107 La. 129—31 So. Rep. 693.

Decided February 17, 1902.

TRIAL: District attorney pro tem.

1. District judges are authorized by law to appoint an attorney to represent the State when, from any cause, the district attorney is excused, necessarily absent, or sick.

2. "Necessarily absent," as used in the statute, means necessarily absent from the court; not from the parish.
  3. The extreme illness of a grandchild, thought to be upon its deathbed, is held to have justified the absence of the district attorney from the court and warranted the judge in appointing a substitute.
  4. The attorney so appointed, having represented the State through the greater part of the trial, and having possessed himself of that knowledge of the facts necessary to the efficient argument of the case, is not to be retired from its further prosecution because of the reappearance in court, on the second day of the trial, of the district attorney. The trial is to be viewed as a whole, and *quoad* the same he remained the district attorney *pro tem.* to the end thereof.
  5. The cause which necessitated the absence of the district attorney having ceased, it was the duty of that official to report to the court, and having done so it is unobjectionable that he participate in the prosecution.
- (Syllabus by the Court.)

Appeal from the Judicial District Court, Parish of Rapids;  
Hon. W. F. BLACKMAN, Judge.

John Smith being convicted of manslaughter, appeals. Affirmed.

*Hunter & Hunter*, for the appellant.

*Walter Guion*, Attorney General, and *James Andrews*, District Attorney (*Lewis Guion* of counsel), for the State.

BLANCHARD, J. The accused was prosecuted for murder and convicted of manslaughter. From a sentence of fifteen years at hard labor, he appeals. It appears from the record that on November 13, 1901, James Andrews, the district attorney, represented to the judge of the district (court being in session) that he was unable to continue in attendance upon the court and to discharge the duties of his office because of the dangerous illness of his grandchild, who was thought to be upon its deathbed. In view of this, he suggested the appointment of John H. Overton, a member of the bar, to act in his stead for and on behalf of the State. Whereupon Mr. Andrews was excused and Mr. Overton appointed to represent the State. He took the oath as district attorney *pro tem.*, and entered upon the discharge of his duties as such. The following day, November 14th, the instant case was called for trial and its trial entered upon. All the State's

witnesses in chief were examined that day, and most of defendant's witnesses. The next day the trial was resumed, the defendant putting two character witnesses on the stand and himself going upon the stand. Then came some rebutting evidence by the State. On this second day of the trial, at the hour of the assembling of the court, Mr. Andrews, the district attorney, appeared and participated in the prosecution of the case to the end, taking part in the argument. Mr. Overton also continued on in the prosecution, making the closing argument for the State. At first no objection was made by the defense to the two participating in the prosecution. Later, however, when the State had called a witness in rebuttal, who was on the stand testifying to the reputation of two witnesses for the defense for truth and veracity, and had stated the same was bad, Overton asked the witness relative to some act of one of the defendant's witnesses. Counsel for defendant objected. This was followed by objection on part of the defense to Overton's further prosecution of the case on the ground that District Attorney Andrews having reappeared in court and being then present prosecuting on behalf of the State, the appointment of Overton as district attorney *pro tem.* had lapsed, and he was *functus officio*. Overton offered to retire if the court thought he should do so; otherwise he said he would continue on to the end of the case, discharging his duty under the oath he had taken. District Attorney Andrews, at this juncture, stated to the court that if Overton retired from the case, it would be tantamount to the acquittal of the accused, for he, Andrews, had not heard the evidence and understood that some of it was different from that adduced upon the preliminary examination of the accused. The trial judge was of the opinion that Overton should continue on to the end of the prosecution of the case, and so ruled. To this ruling a bill of exceptions was reserved, and the matter was again brought to the attention of the court by being made the subject of a motion for new trial, and one in arrest of judgment, both of which were overruled and bills reserved. These bills likewise challenge the legal correctness of the judge's action in appointing Overton at all. The questions arising for determination are, (1) on the showing made of reasons necessitating the absence of the district attorney from the court, did the trial judge err in excusing him and

in appointing Overton to act in his stead; and (2) Overton having been thus appointed district attorney *pro tem.* was it legally permissible for him to continue on in the case, in prosecution thereof, after the reappearance of the district attorney on the second day of the trial?

1. The trial judge did not err in excusing the district attorney and appointing Overton in his stead. The extreme, perhaps deadly, illness of a beloved grandchild was sufficient cause for Mr. Andrews' absence from the court. The state of mind, under the circumstances, of the grandparent was such, it may easily be imagined, as warranted him in asking to be excused. A statute (Act No. 74 of 1886) authorizes district judges to appoint an attorney to represent the State when, from any cause, the district attorney is excused, necessarily absent, or sick. "Necessarily absent," as used here, means necessarily absent from the court—not from the parish, as is the contention of the defense. A court is not to cease the performance of its functions because the prosecuting officer of the State is compelled to absent himself from it. And yet the business of prosecuting criminals before courts cannot go on without a prosecuting officer. Hence, the wisdom of the law empowering the judge of the court to supply the place of the district attorney by the appointment of a member of the bar to discharge the duties of prosecuting officer. See *State v. Johnson*, 41 La. Ann. 1076, 6 South. 802; *State v. Montgomery*, 41 La. Ann. 1087, 6 South. 803; *State v. Richard*, 42 La. Ann. 85, 6 South. 897.

2. The appointment of Overton having been made necessary by the absence of the district attorney, and he having conducted the prosecution of the case through the period of the introduction of the State's evidence, the examination of the State's witnesses, and having thus possessed himself of the facts of the case necessary to its argument before the jury, and having too, alone represented the State during the greater part of the time when the defense was adducing its testimony, it would be an unreasonable requirement did the law exact his retirement instantan from the case the moment the district attorney appeared in court. It were a vain and futile thing to appoint him at all to conduct the prosecution of the case if the knowledge acquired in the course of the examination and cross-examination of witnesses called to

testify he is not to be permitted to utilize in argument, because, just prior to the argument, the district attorney comes into court. When the law spoke authorizing his appointment, it meant it to subserve a useful purpose. It intended that having, as the representative of the State, undertaken the prosecution of a criminal case called for trial, he should go on as such representative to the end of the trial. The trial is to be viewed as a whole, so far as the discharge of his duty in reference to it is concerned, and the unlooked for return of the district attorney did not, as to the case on trial, revoke his appointment. He was acting as district attorney *pro tem.*, representing the State, when the trial was begun. As such he conducted the trial through the greater part thereof. Then the district attorney appeared. But Overton, *quoad* that trial, remained the district attorney *pro tem.* to the end thereof. Such is held to be the reasonable intendment of the law and the common sense of the situation. The cause which necessitated the absence of the district attorney having ceased, it was the duty of that official to report to the court. This he did, and, being there, it was entirely unobjectionable for him to take part in the further trial of the case. Indeed, we rather look upon it as his duty so to have done.

Judgment affirmed.

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#### HENSON v. STATE.

110 Tenn. 47—72 S. W. Rep. 960.

Decided March 7, 1903.

TRIAL: *Statutes examined by juror.*

1. Permitting a juror to examine the statutes is ground for a new trial.
2. The jury should depend upon the court as to the law applicable to the case.

Appeal from the Circuit Court of Jackson County; Hon. W. T. Smith, Judge.

William Henson, being convicted of murder in the second degree, appeals. Reversed.



*D. B. Johnson and W. W. Draper*, for the appellant.  
*Attorney General Oates*, for the State.

NEIL, J. The plaintiff in error was indicted in the Circuit Court of Jackson County for the murder of one Henry McBride, and was convicted of murder in the second degree. He has appealed and assigned errors.

The only error which we shall notice is the following: After the jury had been charged by the court, and had retired to consider of their verdict, one of the jurors—E. W. Jackson—called for the Code of Tennessee, and it was brought to him by the officer in charge. He thereupon examined it, and after such examination declared that he was ready to agree to a verdict of murder in the second degree. Prior to this time he had been in favor of returning a verdict of voluntary manslaughter. This conduct on the part of the juror was offered in the court below as ground for new trial, but the motion was overruled. We think his honor committed error in overruling the motion. We reaffirm the rule upon this subject as laid down in *Dale v. The State*, 10 Yerg. 555, and approved in *Harris v. The State*, 7 Lea, 538, 554, viz.: "The jury are the judges of the law as it applies to the facts. They are the exclusive judges of the facts. But in making up their verdict they are to consider the law in connection with the facts, but the court is the proper source from which they are to get the law. In other words, they are the judges of the law as well as the facts, under the direction of the court." This is the true rule in criminal cases. In the present case it appears that the juror Jackson, instead of taking the law from the court as given to the jury in his honor's charge, undertook to ascertain it for himself by an examination of the Code. This he had no legal right to do, and the refusal of the court below to set aside the verdict on this ground was error.

Reverse the judgment, and remand the cause for a new trial.

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NOTE.—Several other very interesting cases under the heading of TRIAL, will appear in the next volume.

## AMBROSINI v. UNITED STATES.

187 U. S. 1—23 Sup. Ct. Rep. 1—47 Law. Ed. 49.

Decided October 20, 1902.

**WAR REVENUE ACT:** *Scope and construction of it—State Government functions—Bonds given under Illinois Dram Shop Act exempt from taxation.*

1. The Dram Shop Act of the State of Illinois, being "against the evils arising from the sale of intoxicating liquors \* \* \* by regulating it for the protection of the public," is an "exercise of the police powers, for the safety, welfare, and health of the community."
2. Granting a license under such act, is an exercise of government function; and the giving of a bond by the licensee is a part of such transaction.
3. "To tax the license would be to impair the efficiency of State or municipal action.
4. Such bonds are exempt from the War Revenue Act of 1898, not only because of a proviso therein, but upon the general principle, that the National Government should not tax the means or instrumentalities employed by a State, in the exercise of a governmental function.

Writ of error to the District Court of the United States for the Northern District of Illinois.

Peter Ambrosini was convicted and fined for a supposed violation of the War Revenue Act (105 Fed. Rep. 279). The case was argued in the Supreme Court of the United States December 4, 1901. Reversed and remanded, with direction to quash the indictment.

Statement by Mr. Chief Justice FULLER:

This was a writ of error brought to reverse a judgment of the District Court imposing a fine on a finding of guilty of an offense under section 7 of the act of Congress entitled "An Act to Provide Ways and Means to Meet War Expenditures, and for Other Purposes" (30 Stat. at L. 448, chap. 448), otherwise known as the War Revenue Act of 1898. The indictment contained two counts. The first charged that defendant on August 30, 1898, executed a certain bond in the penal sum of \$3,000 to the people of the State of Illinois without affixing to the bond a 50-cent revenue stamp, alleged to be required by said act of Congress. The second count charged that defendant on August 30, 1898, executed a certain bond to the city of Chicago in the penal sum

of \$500 without affixing thereto a 50-cent revenue stamp, alleged to be required by the act. The bonds were set forth *in extenso*. A motion to quash the indictment was made and overruled, and, a jury being waived, the cause was submitted to the court for trial, defendant found guilty, and sentenced to pay a fine. The opinion is reported, 105 Fed. 239.

Sections 6, 7 and 17 of the act are as follows:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same, respectively, or otherwise specified or set forth in the said schedule. . . .

"Sec. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being duly stamped for denoting the tax thereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

"Sec. 17. That all bonds, debentures, or certificates of indebtedness issued by the officers of the United States Government, or by the officers of any State, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this act: *Provided*, That it is the intent hereby to exempt from the stamp taxes imposed by this act such State, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity: *Provided further*, That stock and bonds issued

by co-operative building and loan associations whose capital stock does not exceed ten thousand dollars, and building and loan associations or companies that make loans only to their shareholders, shall be exempt from the tax herein provided."

Schedule A contained this provision: "Bond: For indemnifying any person or persons, firm, or corporation who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, fifty cents."

The bonds, to which it was alleged the stamps should have been affixed, were bonds required by the laws of Illinois to be given as a condition of the issue of licenses to keep dramshops or sell intoxicating liquors in the State of Illinois and in the city of Chicago.

Sections 1, 2 and 5 of an act of the general assembly of the State of Illinois, entitled "An Act to Provide for the Licensing of and against the Evils Arising from the Sale of Intoxicating Liquors," read:

"Sec. 1. That a dramshop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act.

"Sec. 2. Whoever, not having a license to keep a dramshop, shall, by himself or another, either as principal, clerk, or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or in any quantity to be drank upon the premises, or in or upon any adjacent room, building [,] yard, premises, or place of public resort shall be fined not less than twenty dollars [\$20] nor more than one hundred dollars [\$100], or imprisoned in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court."

"Sec. 5. No person shall be licensed to keep a dramshop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town, or village, unless he shall first give bond in the penal sum of \$3,000, payable to the People of the State of Illinois, with at least two good and sufficient sureties, freeholders of

the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person or property, or means of support, by reason of the person so obtaining a license selling or giving away intoxicating liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant." 2 Starr & C. Anno. Stat. (Ill.) 2d ed. 1586, chap. 43.

By article 5, chapter 24 of the statutes of Illinois concerning cities, it was provided:

"Sec. 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers:

"Fourth. To fix the amount, terms, and manner of issuing and revoking licenses. . . .

"Forty-sixth. To license, regulate, and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license: . . . *Provided, further,* That in granting licenses, such corporate authorities shall comply with whatever general law of the State may be in force relative to the granting of licenses.

"Ninety-sixth. To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: . . . " 1 Starr & C. 2d ed. 689, chap. 24.

The Revised Code of Chicago of 1897 provided: "The mayor of the city of Chicago shall, from time to time, grant licenses for the keeping of dramshops within the city of Chicago to persons who shall apply to him in writing therefor, and shall furnish evidence satisfying him of their good character. Each applicant

shall execute to the city of Chicago a bond, with at least two sureties, to be approved by the city clerk or city collector, in the sum of \$500, conditioned that the applicant shall faithfully observe and keep all ordinances in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed, on Sundays, all doors opening out upon any street from the bar or room where such dramshop is to be kept; and that all windows opening upon any street from such bar or room shall, on Sundays, be provided with blinds, shutters, or curtains, so as to obstruct the view from such street into such room. No application for a license shall be considered until such bond shall have been filed." 1 Rev. Code 1897, p. 253, chap. 39, art. 1.

The ordinance contained many other specific regulations of the traffic, and provided that licenses might be revoked by the mayor for violation of "any provision of any ordinance of the city council relating to intoxicating liquors, or any condition of the bond aforesaid."

The conditions of the bond in the sum of \$3,000 to the People of the State of Illinois were substantially in the words of the statute. The conditions of the bond in the sum of \$500 to the city of Chicago were somewhat more stringent than the language of the municipal Code.

Messrs. *T. A. Moran* and *Levy Mayer*, for plaintiff in error.  
Assistant Attorney General *Beck* for defendant in error.

Mr. Chief Justice FULLER delivered the opinion of the court:

By the Dramshop Act the general assembly of Illinois legislated, as was stated in the title of the act, "against the evils arising from the sale of intoxicating liquors," not by prohibiting the traffic altogether, but by regulating it in protection of the public. The act concerning cities authorized municipal action subject to the general law.

The legislation was enacted in the exercise of the police power for the safety, welfare, and health of the community, and it is conceded that that power is a power reserved by the States, free from Federal restriction in any particular material here.

The act and the ordinance required these bonds to be given as prerequisites to the issue of licenses permitting the sale. The

licenses could not be issued without compliance with this condition precedent. The statute expressly provided that no license should be granted "unless he shall first give bond in the penal sum of \$3,000," and the ordinance, that "no application for a license shall be considered until such bond shall have been filed."

The bonds were obviously intended to secure the proper enforcement of the laws in respect of the sale of intoxicating liquors; the prompt payment of fines and penalties; a remedy for injuries in person, property, or means of support; and the protection of the public in divers other enumerated particulars. The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of State and municipal action on the subject and assumes the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of State and of city, as authorized by the State, to insure the public welfare in the conduct of the business, although the business itself was not governmental. They were not mere individual undertakings to secure a personal privilege as suggested by the court below, but means for the preservation of the peace, the health, and the safety of the community in compelling strict observance of the law, and remedying injurious results.

The general principle is that, as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the States, so are those of the States exempt from taxation by the general government. It rests on the law of self-preservation, for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter. Nelson, J., *The Collector v. Day*, 11 Wall. 113, *sub nom. Buffington v. Day*, 20 L. Ed. 122.

Viewed in the light of that general principle, we think it clear that Congress, lest the broad language of schedule A, "and all other bonds of any description," might literally cover bonds such



as those in question, and in avoidance of controversy in that regard, exempted them by section 17, wherein it was declared that it was intended "to exempt from the stamp taxes imposed by this act, such State, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity." True, this language was used in a *proviso*, and the enacting clause exempted bonds "issued by the officers of . . . any State, county, town, municipal corporation, or other corporation exercising the taxing power;" but as the bonds were required by the State and the city, and were issued for the benefit of the public, and not for the benefit of the individuals who executed them, it appears to us that they came fairly within the meaning of the clause, assuming that they were covered by schedule A. The question is whether the bonds were taken in the exercise of a function strictly belonging to the State and city in their ordinary governmental capacity, and we are of opinion that they were, and that they were exempted as no more taxable than the licenses. Either they were exempt, apart from the *proviso*, because, in the sense of the statute, issued by the State and city, or the *proviso* so far qualified the language of the enacting clause as to exempt them in exempting the State and city in respect of the exercise of strictly governmental functions.

We conclude, therefore, that they were not taxable within the statute. *United States v. Owens*, 100 Fed. 70; *Stirneman v. Smith*, 40 C. C. A. 581, 100 Fed. 600; *Warwick v. Bettman*, 102 Fed. 127, 47 C. C. A. 185, 108 Fed. 46; *People v. City*, 31 Chicago Legal News, 247.

Judgment reversed and cause remanded with a direction to quash the indictment.

Mr. Justice HARLAN did not hear the argument, and took no part in the decision.



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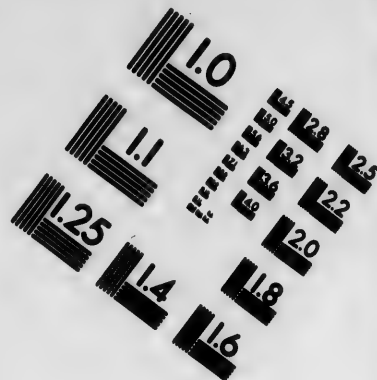
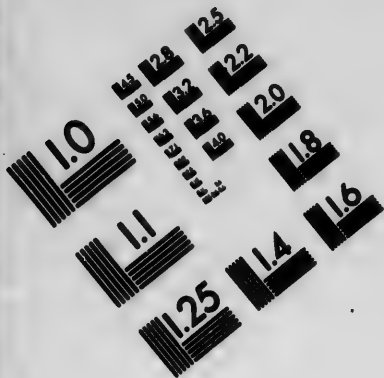
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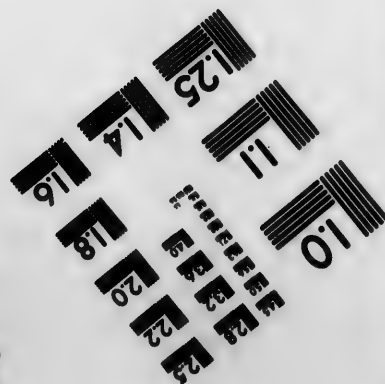
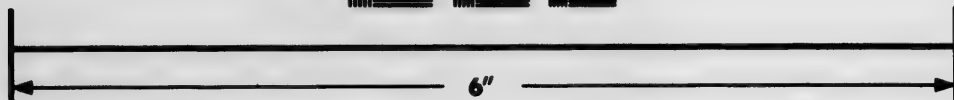
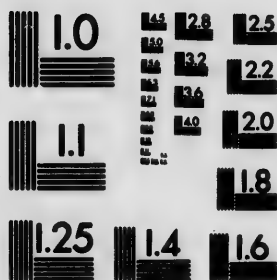
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